Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JAMES CANNINGS, et al.,

Petitioners,

v.

THE LIBRARIAN OF CONGRESS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chapter 8 of title 17 U.S.C. was amended by the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304, which substituted a new chapter title heading, new section designations and headings for section 801 and 802 and new text for section 802. The questions are:

1. Whether a standard of judicial review, more relaxed than that specified by the Administrative Procedure Act (APA), is an "additional requirement * * * otherwise recognized by law" within the meaning of Section 802(g).

2. Whether a standard of judicial review, granting the Librarian of Congress ("Librarian") substantially more deference than that allowable under the APA, confers to the Librarian the right to circumvent his statutory authority, and grants monopolies the right to conduct naked restraint of trade with no purpose except stifling of competition.

3. Whether this "exceptionally deferential standard of review" and resulting actions are in conflict with (a) United States Constitution, Article 1, Section 8, (b) the Intent of Congress, (c) Title 17 U.S.C., (d) the Sherman Act of July 2, 1890, as amended, (e) prior Supreme Court and Federal Circuit Decisions, declaring that "[a]rbitrators need not disclose the facts or reasons behind their

QUESTIONS PRESENTED – Continued

award,"[1] and (f) the Due Process Clause of the Fifth Amendment of The United States Constitution.

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[1] *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); *Elfer Mfg., Inc. v. Kowin Development Corp.*, 14 F.3d 1250 (7th Cir. 1994); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986).

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the Court of Appeals were as follows:

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PARTIES TO THE PROCEEDING BELOW – Continued

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PETITION FOR WRIT OF CERTIORARI

James G. Cannings, and Alicia C. Evelyn[2] (copyright owners, songwriters and publishers) (App., *infra*, 69a-70a), (App., *infra*, 71a-73a), respectfully pray pursuant to Rule 12(4) that a writ of certiorari issue to review several judgments with similar issues, of the United States Court of Appeals for the District of Columbia Circuit, in *James G. Cannings v. the Librarian of Congress*, No. 98-1250 and *Eugene Curry, et al. v. the Librarian of Congress, et al.*, No. 97-1119.

JUDGMENTS BELOW

The judgments of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, 1a-3a, 9a-11a), are unreported. Petitioners' petitions for rehearing and rehearing in banc were denied (App., *infra*, 6a, 7a), and are unreported. The final orders of the Librarian of Congress (App., *infra*, 12a-59a) are reported in the Federal Register.

JURISDICTION

The judgments of the court of appeals were entered March 2, 1999 and November 4, 1998. The judgments denying petitioners' petitions for rehearing in banc were entered on February 4, 1999. The jurisdiction of this court is involved under 28 U.S.C. 1254(1).

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[2] *Alicia Evelyn v. the Librarian, et al.*, No. 97-1136 and *James Cannings v. the Librarian, et al.*, No. 97-1143 were consolidated, by the court of appeals on its own motion, with *Eugene Curry, et al. v. the Librarian, et al.*, No. 91-1119. Mr. Curry's petition for rehearing was denied on November 27, 1998.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article 1, Section 8 provides in pertinent part:

> The Congress Shall have Power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries * * * [t]o make laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.

2. United States Constitution, Amendment 5, provides in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

3. The intent of the United States Congress, provides in pertinent part:

> [T]o ensure an author and his dependents the fair economic benefits from his works,"[3]

4. Section 701 of Title 5 of the United States Code (drawn from Sections 2 and 10 of the Administrative Procedure Act, Pub. L. No. 404, ch. 324, 60 Stat. 287) provides in pertinent part as follows:

§ 701. Application; Definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that –

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[3] H.R. Vol. 3-8, 94th Cong., 2d Sess. (Copyright Law Revision. Report No. 94-1476, Section 302 (1)) (January 19-October 1, 1976).

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For purposes of this chapter –

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –

(A) the Congress;

(B) the courts of the United States;

(C) the government of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or the representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743 and 1744 of title 12; chapter 2 of title 41; subchapter 11 of chapter 471 of title 49; or sections 1884, 1891, 1902, and former section 1641 (b), of title 50, appendix[.]

5. Section 706 of Title 5 of the United States Code (drawn from Section 10(e) of the Administrative Procedure Act, Pub. L. No. 404, Ch. 324, 60 Stat. 243) provides in pertinent part as follows:

§ 706. Scope of review

To the extent necessary for decisions and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

6. Section 701 of Title 17 of the United States Code provides in pertinent part as follows:

> (d)' * * * [A]ll actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

7. Section 801 of Title 17 of the United States Code, Pub. L. No. 103-198, 103d Congress, 107 Stat. 2394 (Copyright Royalty Tribunal Reform Act of 1993) provides in pertinent part as follows.

> (c) Rulings – The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration panel is convened, make necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel.

8. Section 802 of Title 17 of the United States Code, Pub. L. No. 103-198, 103d Congress, 107 Stat. 2394 (Copyright Royalty Tribunal Reform Act of 1993) provides in pertinent part as follows.

> (c) Arbitration Proceedings – Copyright arbitration royalty panels (CARP) shall conduct arbitration proceedings, subject to subchapter II of chapter 5 title 5, for the purpose of making their determinations in carrying out the purposes set forth in section 801.

STATEMENT OF THE CASE

1. Petitioner Mr. Cannings filed claims of entitlement to royalties due and payable under Title 17 U.S.C., Sections 111 Secondary Transmissions (Cable), and 1001 Digital Audio Recording Devices and Media (DART), of the Copyright Act of 1976.[4] Petitioner Ms. Evelyn filed claims of entitlement to royalties solely under DART Musical Works Subfund.[5]

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[4] Mr. Cannings' claims were for both the Sound Recording Fund and the Musical Works Fund.

[5] The Musical Works Fund is divided in two subfunds – the Writers Subfund and the Publishers Subfund. 17 U.S.C. § 1006(b)(2)(A)-(B)(i)(ii).

Overview – The statute divides responsibilities regarding the collection and distribution of compulsory licenses royalties between the Librarian and the Register of Copyrights (Register), and requires that, every person claiming to be entitled to compulsory license fees file a claim with the Librarian with requirements that the Librarian shall prescribe by regulation. The Library of Congress, upon the recommendation of the Register shall provide the Copyright Arbitration Royalty Panel (CARP) with the necessary administrative services related to the proceedings. Sec. 802(d). All fees are to be received and after deduction of Copyright Office's costs, deposited by the Register into interest bearing accounts in the Treasury of the United States, for later distribution with interest by the Librarian in the event no controversy or the CARP in the event a controversy over distribution exists. At the time of these cases, the Librarian upon the recommendation of the Register may, before the CARP is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by the panel. § 801(c).

In cases where a controversy exists, the Librarian, upon the recommendation of the Register, is authorized to convene and provide administrative services to the Copyright Arbitration Royalty Panels (CARPs). The CARP shall conduct arbitration proceedings, subject to subchapter II of chapter 5 title 5 and shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal (CRT), prior CARP determinations, and rulings by the Librarian under section 801(c). Subsection 802(f) grants the Librarian, upon the recommendation of the Register, the authority to adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the panel

unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of the Act. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, after a full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution fee, as the case may be. Final determination is published by the Librarian in the Federal Register. Subsection § 802(g) grants the United States Court of Appeals for the District of Columbia Circuit jurisdiction for judicial review of the decision of the Librarian. The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount of distribution of royalty fees and costs, to order repayment of any excess or underpaid fees, and interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate or modify the decision of the arbitration panel, and remand the case to the Librarian for arbitration proceedings in accordance with subsection (c).

2. All issues stated herein by petitioners were issues raised before the Copyright Office, CARP, the Librarian, and the court of appeals.

(a) Determination for Distribution of the 1991 Cable Royalties in the Music Category:

Parties in the Phase II[6] proceeding were Broadcast Music, Inc. (BMI), American Society of Composers,

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[6] Phase I divides the royalties among categories of copyright owners. Phase II divides the royalties among copyright owners within a category.

Authors and Publishers (ASCAP), SESAC, Inc. (SESAC), collectively Music Claimants.

The Music Claimants' motion to dismiss the claim of Mr. Cannings was denied. A CARP was convened and awarded Mr. Cannings $63.74 (BMI's internal rate), that, according to BMI's expert witness, was not to be considered as payment to Mr. Cannings in this proceeding, for his two featured performances[7] on the national Joe Franklin TV Show, secondarily transmitted by superstation[8] WWOR in 1991. Mr. Cannings' proposal of $2,400 represented a prior American Arbitration (AAA) award to him that resulted from a dispute between Mr. Cannings and BMI while he was an affiliate. The CARP gave no weight to Mr. Cannings' award because they required a reasoned AAA award. App., *infra*, 22a-23a. The Librarian ratified but did give weight to Mr. Cannings' assertion that the award included BMI's administrative cost, that he is not a member, that the rate should be adjusted upward, and that Mr. Cannings did " * * * not state what the proper rate should be." (App., *infra*, 28a). However, Mr. Cannings' proposal was that proper rate. Consequently, Mr. Cannings appealed.

(b) Distribution of the 1992, 1993 and 1994 DART Musical Works Fund:

Parties in the agency proceeding were Broadcast Music, Inc. (BMI), American Society of Composers, Authors and Publishers (ASCAP), SESAC, Inc. (SESAC),

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[7] A featured performance is defined as a work which constitutes the main focus of audience attention.

[8] A superstation is defined as a television broadcast station, other than a network station, licensed by the FCC that is secondarily transmitted by a satellite carrier. § 119(d)(9).

The Harry Fox Agency, Inc. (HFA), Copyright Management, Inc. (CMI), The Songwriters Guild of America (SGA), and Gospel Music Coalition, (GMC) (collectively "Settling Parties") v. Individual Claimants, James Cannings/Can Can Music, a prior affiliate of BMI,[9] Alicia Evelyn, a member of ASCAP, Eugene Curry/Tajai Music, an affiliate of BMI and David Cone/Bopp du Wopp, Inc., an affiliate of BMI, did not settle amongst themselves. The Settling Parties' motion for summary judgment against the four individual claimants was denied by the Librarian. A CARP was convened. The Settling Parties filed a motion to dismiss James Cannings and David Cone and to declare no controversy and enter award on behalf of Alicia Evelyn. The Librarian granted the motion to dismiss for late or insufficient claims (see Reasons for Granting the Writ at 11), but determined that a controversy did exist between Ms. Evelyn and the Settling Parties.

During discovery Ms. Evelyn's requests for underlying documents, in most cases, were either denied by the Settling Parties, or in other cases, they provided some irrelevant documentation. Ms. Evelyn filed an objection

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[9] BMI terminated Mr. Cannings' affiliation on July 5, 1995, only after, the aforementioned AAA arbitration. His award for $5,600 including costs, was confirmed. *James Cannings v. BMI, Supreme Court of the State of New York*, Index No. 119557/94 (1994). Mr. Cannings charged BMI, among others, with a breach of fiduciary obligation and fraudulent misrepresentation relating to cable compulsory license royalties, distributed by the CRT to BMI, and not redistributed to him, for 1985, 1986, 1989 & 1990. Mr. Cannings has since founded Our Own Performance Society (OOPS), a performing rights organization. He is at present not a member or affiliate of any other performance rights society in America.

to the conduct, responses and non-production of documents by the Settling Parties. (Prehearing TR 19: 9-22, 20-23. Curry v. Libr.) A motion for a paperhearing was introduced by the Settling Parties and opposed by Mr. Curry and Ms. Evelyn on the ground that there were issues of material facts. The Librarian denied the Settling Parties' motion but designated the issue to the CARP.

The CARP concluded that they would proceed with a paperhearing. Ms. Evelyn's "only objection" was that all of her pleadings and documents exchanged during discovery would be omitted from the fully documented written record of the CARP. The CARP ruled that it proceed based solely on the written direct cases, proposed findings and conclusions, and replies thereto.[10] App., *infra*, 42a-43a.

Ms. Evelyn raised many issues in her petition to modify, including, but not limited to, the failure of the Settling Parties (BMI and ASCAP) to fulfill their fiduciary obligations toward their members and affiliates (Evelyn and Curry). She and Mr. Curry asserted that they failed to provide: (a) public performance and sales data pertaining to Individual Claimants' DART eligible songs, and (b) Ms. Evelyn's ASCAP catalog, particularly two of her hit songs. Ms. Evelyn further contended that the AHRA Act was enacted on October 28, 1992 (Pub. L. 102-563, 106 Stat. 4237), and that the Settling Parties provided unexplained record sales for the period beginning from January 1, 1992 to December 31, 1992, instead of from October 28, 1992 to December 31, 1992, the period within which the Act was law. App., *infra*, 49a-55a. The Librarian

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[10] Prehearing TR 33:11-22, 34:1. Exhibit *Curry v. The Librarian*, No. 97-1119 (U.S. App. D.C. 1997).

denied Mr. Curry's and Ms. Evelyn's petitions. They appealed.

REASONS FOR GRANTING THE WRIT

1. The provisions of the Administrative Procedure Act now embodied in Title 5 of the United States Code provide a generally applicable framework for proceedings seeking judicial review of "agency action." *See* 5 U.S.C. 602. The term " 'agency action' includes the whole or a part of an agency * * * order, * * * relief, or the equivalent or denial thereof," and "relief" includes any agency "recognition of a claim, right, * * * [or] privilege * * * [or the] taking of other action on application or petition of, and beneficial to, a person." 5 U.S.C. 551(II)(B), (II)(C), and (13) 701(b)(2). The term "agency" includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. 701(b)(1). By their terms, these provisions apply to the Federal Circuit's review of decisions by the Copyright Royalty Tribunal, now the Librarian.[11]

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[11] Judicial Review under Administrative Procedure Act in general. *See* C.J.S. Public Administrative Law and Procedure §§ 171-172.

Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, C.A., 720 F.2d 1295, 232 U.S. App. D.C. 68. *National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, C.A., 724 F.2d 176, 233 U.S. App. D.C. 44. *Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*, C.A. 7, 676 F.2d 176, 1144, *certiorari denied*, 103 S. Ct. 210, 459 U.S. 907, 74 L. Ed. 2d 168. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, C.A. 772 F.2d 922, 249 U.S. App. D.C. 4, *certiorari denied, Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 106 S. Ct. 1245, 475 U.S. 1035, 89 L. Ed. 2d 353. *National Ass'n of*

The APA provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703. Under the present copyright laws, if a "dissatisfied" claimant seeks review of the Librarian's decision in the Court of Appeals for the District of Columbia Circuit, the Librarian must certify the administrative record to that court. The court then "reviews the decision from which an appeal is taken on the record before the Librarian. Review concludes when the court issues to petitioner its opinion or judgment and mandate.

As the court of appeals noted in *National Ass'n of Broadcasters v. the Librarian, et al.*, 146 F.3d 907, 922 (D.C. Cir. 1998):

> Where Congress has not prescribed the degrees of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, * * *

The absence of a specific standard does not, however, authorize a reviewing court to adopt whatever standard it deems appropriate under all circumstances. This Court has made it clear that, "[i]n the absence of a specific command in [a relevant statute] to employ a particular standard of review" of administrative action, that action "must be reviewed solely under the * * * standard prescribed by the Administrative Procedure Act." *American*

Broadcasters v. Copyright Royalty Tribunal, C.A. 675 F.2d 367, 218 U.S. App. D.C. 348. *Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc.*, C.A. 836 F.2d 599, 266 U.S. App. D.C. 435, *certiorari denied*, 108 S. Ct. 2901, 101 L. Ed. 2d 934, and *National Cable Television Ass'n, Inc. v. Columbia Pictures Industries, Inc.*, 108 S. Ct. 2901, 101 L. Ed. 2d 934.

Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 412-413 n.7 (1983); *see also Steadman v. SEC*, 450 U.S. 91, 95-97 & n.9 (1981); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971); *cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-549 (1978) (court may not impose, on policy grounds, rulemaking procedures beyond those required by the APA or another applicable statute).

Under the APA, the Federal Circuit may "set aside" the Librarian's "action, findings and conclusions" if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if [he] failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, at 414 (1971) (quoting 5 U.S.C. 706(2)(A)-(D)).

Because the Librarian's decisions are "reviewed on the record of an agency hearing provided by statute," they are also subject to the somewhat more searching "substantial evidence" standard of 5 U.S.C. 706(2)(E). *See American Paper Inst.*, 461 U.S. at 412 n.7 (distinguishing substantial-evidence review from "the more lenient arbitrary-and-capricious standard"). Nothing in the APA, however, authorizes the Court of Appeals for the District of Columbia Circuit to subject the Librarian's decisions to the "judicial review that must be correspondingly relaxed" that the Court elected to apply in these cases. *Nat'l Assoc. of Broadcasters v. Libr. of Congress. Id.*

2. The court of appeals sought to justify its frank adoption of an "exceptionally deferential standard of review" in copyright cases, "free[d]" from the otherwise applicable limits of the APA, on the ground that such an "exceptionally deferential standard of review" is within the meaning of 17 U.S.C. subsection 802(g). The court

reasoned that the, "exceptionally deferential standard of review"

> may become more rigorous over time as the decisionmaker acquires greater experience with a particular scheme. *Id.* NAB at 922.

This assessment of the court is troubling. There is no statutory construction nor intent of Congress to support this *added* deference. A non-APA standard of review specified by a particular statute would presumably govern in proceedings under that statute, whether more stringent or more lax than those set out in 5 U.S.C. 706. *See, e.g., American Paper Inst.*, 461 U.S. at 412 n.7 (APA standard to be applied "[i]n absence of a specific command in [the relevant statute] to employ a particular standard of review"). That result does not depend, however, on 17 U.S.C. subsections 802(f) or 802(g) standard of review, but on an inconsistent direction concerning the manner in which review should be conducted. The inconsistency would be resolved in accordance with ordinary principles of statutory construction, including the principle that a more specific enactment normally controls rather than a general one. Despite the court of appeal's novel analysis (*see* App., *infra*, 1a, 9a, *supra*, NAB), an important general purpose of the APA was to "supplant a variety of preexisting methods for obtaining [judicial] review that differed from one agency to another." *Cousins v. Dept. of Transportation*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc) (Breyer, J.)[12] Thus, although Congress certainly looked to

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[12] *See also Cousins*, 880 F.2d at 606, quoting S. Rep. No. 442, 76th Cong., 1st. Sess. 9-10 (1939) (relating to an earlier version of the legislation that became the APA) (" 'unfortunately,' existing statutes d[id] not provide for a uniform method and scope of judicial review' "); *cf.* H.R. Rep. No. 1980, 79th Cong., 2d Sess.

existing law when it framed the new, generally applicable review provisions of the APA, there is no reason to think that it intended to preserve, rather than eliminate, deviations from the norm it was prescribing.

Moreover, what the legislative history demonstrates is that Congress specifically considered the nature of compulsory license proceedings and the role of the Librarian, Register, and Copyright Office but enacted the Copyright Royalty Tribunal Reform Act of 1993 without specifically excepting the Librarian from judicial review provisions of 5 U.S.C. §§ 701-706. In fact, all administrative functions and duties under Title 17 U.S.C. are under the responsibility of the Register, as director of the Copyright Office of the Library of Congress. 17 U.S.C. § 701(a). *All actions* (including establishing of regulation), taken under Title 17 U.S.C. by the Register, are subject to the provisions of the APA of June 11, 1946, as amended. 17 U.S.C. § 701(d). The CARPs shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5. 17 U.S.C. § 802(c). The Librarian upon the recommendation of the Register is required to adopt the determination of the CARP unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of Title 17 U.S.C. § 802(f). Judicial review is on

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16 (1946) ("the bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (*See* [the definitional provision now particular operation at 5 U.S.C. 551(1)]). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.").

the basis of the record before the Librarian. Title 17 U.S.C. § 802(g).

The basis of the record before the Librarian must be established by (a) the rules and regulations issued by the Register, subject to *the approval of the Librarian* and (b) the CARPs determinations, which are, among others, subject to the APA and the rules and regulations of the Register. *See* 17 U.S.C. §§ 701-702, – 37 C.F.R. Part 251-259 (authority:17 U.S.C. §§ 801-803).

Thus, the Register's review and recommendation of the CARP report to the Librarian constitutes an *action* of the Register (App., *infra*, 47a), that is subject to subchapter II of chapter 5 of title 5 *and Chapter 7* of the APA. 17 U.S.C. § 701(d).

The intent of Congress on this issue is clear "[t]he Register of Copyright and the Librarian of Congress will play important roles in convening and reviewing the decisions of the arbitration panels." 103d Cong., 1st Sess. (CRT Reform Act of 1993. Report 103-286 at 11) October 12, 1993.

The court of appeals failed to make this substantial link in its reasoning. NAB *supra.*[13]

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[13] "The 1993 Act's *sole* reference to the APA is found in subsection 802(c), * * * [w]e find these changes together with the significant structural changes effected by the 1993 Act, to be compelling evidence of the Congress's intent to limit the applicability of the APA. Thus, to the extent the presumption in favor of applying the APA requires us to adhere to the review standard set forth in 5 U.S.C. § 706(2), we think this is one of those unusual circumstances in which the Congress's intent is sufficiently clear to overcome the presumption." NAB at 919, n.9, *supra.*

Therefore, the court of appeals erred in interpreting 17 U.S.C. § 802(g) and created an exception that Congress itself did not see fit to make. It is disingenuous to suggest that the court of appeals review a record of the Librarian, that is adjudicated and reviewed on the basis of the APA, with a standard of review other than the APA. Indeed it is the consistent application of standards, prescribed in the APA and the statute that must be reviewed by the Register, who in turn must be reviewed by the Librarian to determine if the recommended determination of the CARP and Register – both of whom are subject to the APA – conforms to the statute. Furthermore, the Librarian stated that:

> * * * [n]either the Reform Act nor its legislative history indicates what is meant specifically by 'arbitrary,' but there is no reason to conclude that the use of the term is any different from 'arbitrary' standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A). App., *infra*, 16a-19a, 44a-47a.

3. It is arbitrary if an agency's action is not committed to the agency's discretion by law. Under § 801(c) the Librarian upon the recommendation of the Register has the authority to make any procedural and evidentiary rulings. On May 9, 1996 the Librarian, based upon the recommendation of the Register's ruling on a *dispositive* motion of monopolies (ASCAP, BMI, SESAC, Harry Fox Agency, et al.), without clear statutory authority to dismiss claims, dismissed from the DART proceeding petitioner Mr. Canning's and Mr. Cone's timely and valid claims.[14] (Recommendation and Order Doc. No. 95-1

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[14] Both Mr. Cannings and Mr. Cone settled their claims and were paid royalties in the Recording Subfund 1992-94. The basis

CARP DD 92-94). In taking this action the Librarian clearly circumvented his statutory authority for which there is judicial remedy. According to Congressional records, on November 9, 1995, the Register requested from Congress "clear authority to dismiss late or insufficient claims."[15] App., *infra*, 62a.

On November 13, 1997, *subsequent* to the Librarian's dismissal order of May 9, 1996, Congress enacted H.R. 672 which amended U.S.C. § 801 of title 17 adding subsection (c)(2). H.R. 672 approved the Register's request (n.15).[16] App., *infra*, 66a. Therefore, at the time of the May 9, 1996 dismissal order, neither the Register nor the Librarian had clear Congressional authority to dismiss either Mr. Cannings' or Mr. Cone's claims.

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for entitlement to the Sound Recording Fund is: any interested copyright party (1) whose musical work or sound recording has been – (A) embodied in a digital or analog musical recording lawfully made under this title that has been distributed, and (2) who has filed a claim under section 17 U.S.C. 1007 § 1006(a)(1)(A)(B). Mr. Cannings met all of the above statutory requirements and pursuant to 37 C.F.R. § 251.44(e) incorporated this evidence by reference in his Direct Case.

[15] Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary. House of Representatives (104th Congress, First Session on H.R. 1861 (Copyright Act Technical Corrections) Serial No.32 Nov. 9, 1995 at 18). The Committee's Subcommittee on Courts and Intellectual Property held a hearing on H.R. 1861, a technical corrections bill containing almost all of the provisions contained in H.R. 672, on November 9, 1995. Testimony was received from Ms. Marybeth Peters, Register of Copyrights, United States Copyright Office, The Library of Congress (Serial 32). No hearings were held on H.R. 672 in the 105th Congress.

[16] P.L. Technical Amendments. 105-80 Nov. 13, 1997.

The court of appeal's "exceptionally deferential standard of review" (App., *infra*, 9a-11a), failed to redress petitioner's statutory right to his statutory claim, valued at $30,000. Moreover, the court of appeal's standard of review caused a legal and economic detriment. It granted zero dollars to petitioner.

A copyright is private property. By the Librarian's action, Mr. Cannings' intellectual property was taken by the government (compulsory license), for public use (transmissions and sales) without just compensation. This legal and economic detriment caused by the court of appeal's standard of review, other than the APA, conflicts with: (a) United States Constitution, Amendment 5, which provides in pertinent part: * * * nor shall private property be taken for public use, without just compensation, and (b) the intent of the United States Congress, which provides in pertinent part: "to ensure an author and his dependents the fair economic benefits from his works." *Supra*, p. 2, n.3. The Librarian's action arbitrarily, and contrary to statute, removed from petitioner (copyright owner), copyright protection conferred to him by statute. It ushered his work into public domain. The court of appeals erred in granting "exceptional deference to the Librarian," to the ultimate detriment (irreparable harm) to others who may have had better standing if granted equal protection under law. Thomas Jefferson expressed his thoughts on this issue when he included the phrase in his 1801 inaugural address, "equal and exact justice to all men."

Infringement and remedies normally available under 17 U.S.C. Chapter 5 are void. Compulsory licenses bar any redress. The users of music have paid their statutory licensing fees to the Licensing Division of the Copyright

Office. Payment of statutory licensing fees immunizes users from copyright infringement. Remedies available under 28 U.S.C. 1498 do not apply. The Librarian, to whom Congress entrusted as guardian of United States Copyright Law, himself, by his action breached it.

In this instance, the Librarian plainly contravened applicable statutory provisions. Under the standard of review of the APA, and as a matter of law, the Librarian did act in an arbitrary manner.

Nevertheless the court agreed that it is required to act, even under its present standard of review. The court states in pertinent part:

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect judiciable individual rights against administrative action fairly beyond the granted powers. *Supra.* NAB at 924.

The court failed to act against the Librarian's arbitrary action which went beyond his granted powers – powers vested in the Constitution, Article 1, Section 8, through Congress in the Copyright Law to him.

4. The requirement by the Librarian in the cable distribution proceeding for a reasoned arbitration award which established a market value[17] conflicts with decisions of this Court and Federal Courts. This Court said,

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[17] "The Panel was well within its discretion to reject the BMI" (should be Mr. Cannings') "arbitration award as evidence particularly where it * * * was made without an explanation." App., *infra*, 31a-32a.

"Arbitrators have no obligation to the court to give reasons for an award." *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); "Arbitrators need not disclose the facts or reasons behind their award. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); *Elfer Mfg., Inc. v. Korwin Development Corp.*, 14 F.3d 1250 (7th Cir. 1994); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986). *See New York State Bar Association International Arbitration Seminar. Should Arbitral Decisions be Reasoned? By Michael F. Hoellering, General Counsel American Arbitration Association. (April 1998).* U.S. law generally requires an arbitration award to be written and signed, but it need not be accompanied by an opinion setting forth the arbitrator's reasoning. *See Domke on Commercial Arbitration* § 29:06 (Rev.Ed.) at 436.

Moreover, the "American Arbitration Association Guide for Commercial Arbitrators" states under caption, "No Written Opinion is Required," –

> Commercial arbitrators are not required to explain the reasons for their decisions. *See American Arbitration Commercial Arbitrators Guide,* Booklet No. 39-20M-4/91 at 24.

6. Contrary to Title 17 U.S.C. § 111(d)(2) which states in pertinent part:

> * * * fees deposited with the Register * * * shall be invested * * * for later distribution with interest by the Librarian * * * or the CARP * * *

the CARP and the Librarian denied Mr. Cannings' request for interest on his award. (App., *infra*, 34a).

Therefore, the determination of the Librarian that (a) requires a reasoned arbitrator's award, and (b) does not award interest, constitutes arbitrary and prejudicial errors against Mr. Cannings who, through the principle of

due process, is entitled as a matter of Law to the relief demanded.

7. In this Court's opinion in *Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al.*, the majority declared:

> here we are uncertain whether the practice [blanket license/compulsory license] on its face has the effect * * * of restraining competition among the individual composers. 441 U.S. at 13, 99 S. Ct. at 1559, 629 F.2d 930, 935 (1980).

ASCAP is identified in the above case as a monopoly. *Id.* at 36. BMI " * * * operates in much the same manner as ASCAP." *Id.* at 5.

In their own unique way these cases before the Court present some clarity to the Court's uncertainty. The individual claimants (copyright owners) in these cases, unequivocally attest to the fact that the effect of restraining competition in these cases, does *not* exist amongst the individual composers. The effect of restraining competition in the compulsory license scheme exists between the individual composers and monopolies, particularly the performing rights organizations, ASCAP, BMI and SESAC, who also represent them. No doubt the individual claimants in these cases are competitors in a free-market economy. However, the written documented record before the Librarian is replete with monopolies attempting "naked restraint of trade with no purpose except stifling of competition" – their own members and affiliates. The Librarian's final determination stipulates: "[t]hrough a *series of motions to dismiss* certain parties and as a result of continued negotiations, nine parties remained in the DART proceeding * * * " App., *infra*, 42a.

[Emphasis added]. Indeed it became a process of elimination of entitled claimants from their statutory right and protection.

The monopolies adopted a form of price-fixing to unsubstantiated evidence in the record. They conducted exclusive analysis and surveys of individual claimants sales, determined what these claimants were entitled to (which in most cases were absolutely wrong) and declared their assessment to the Librarian, who adopted their determination. On the other hand, these monopolies' stated share of the pie was absolutely unsubstantiated in the record.

The Certified List of Items in the Record of the DART proceeding shows that, except for two motions to dismiss, the Settling Parties were movants in all others. The same conduct was made manifest in the cable distribution proceeding. The Settling Parties moved to dismiss their *sole* competitor, Mr. Cannings. The effect of this conduct tends to restrict competition and threaten the proper operation of our predominantly free-market economy. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978). Already many copyright owners who have been dismissed by the Librarian have abandoned this process altogether.

This Court recognized in *BMI v. CBS* that:

> ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of use of their music and other factors. * * * BMI * * * operates in much the same manner as ASCAP. *Id.* at 5.

Both Ms. Evelyn (an ASCAP member) and Mr. Curry (a BMI affiliate), during discovery, requested from ASCAP

and BMI data pertaining to their DART eligible songs. App., *infra*, 48a-50a. Their requests were denied. The only organizations in America who could collect and are obligated to provide this data, *supra*, *BMI v. CBS*, declared to Ms. Evelyn in a Follow-up Request for Underlying Documents, that "Ms. Evelyn's attempts to place the burden of proving her own case on anyone but herself are improper and must be rejected." Evelyn Follow-Up Request for Underlying Documents at 7 n.4. This limiting, restricting and interfering with the right of a member of a performing rights society to be justly compensated for issuance to a user, through the compulsory license, non-exclusive rights to public performance of their music, violates the Consent Decree of ASCAP, Section IV(B). *See United States v. The American Society of Composers, Authors and Publishers*, No. 13-95 (1950) which states in pertinent part:

> ASCAP is hereby enjoined and restrained from – [l]imiting, restricting, or interfering with the right of any member to issue to user non-exclusive license for rights of public performance.

Further, this Court recognized that, "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve * * * problems" associated with the licensing of music.[18] BMI * * * operates in much the same manner as ASCAP. *Id.* at 5.

7. The attempt of these monopolies to limit, restrict and interfere with competition is further revealed by four more blatant instances. BMI's expert witness and employee Ms. Alison Smith declared that Mr. Cannings must pay a penalty for not accepting BMI's rate. In the Direct Case of Music Claimants (ASCAP, BMI & SESAC),

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[18] 400 F. Supp. 737, 741 (SDNY 1975).

in the 1991 Cable Distribution Proceeding, she stated that Mr. Cannings "has categorically rejected the BMI rate. He therefore is not entitled to the higher BMI rate." *James Cannings v. The Librarian, et al.*, JA. 12, at 15, U.S. D.C. Cir. 98-1250 (1998). In the 1992-1993 DART proceeding, the Settling Parties Motion to Declare no Controversy and Enter Award on Behalf of Alicia Evelyn, *supra* at p. 9 (DART Dist'r Proceeding), was unilaterally decided and filed by the Settling Parties without Ms. Evelyn's prior knowledge and consent. BMI unilaterally cancelled their affiliation agreement with Mr. Cannings after he challenged them in arbitration.

Quite recently, the Copyright Office entertained comments and replies on Notice of Proposed Rulemaking (37 C.F.R. Part 251, Doc. No. 98-3 CARP). The aforementioned monopolies filed comments which propose *trade barriers* against small claimants. The monopolies proposed a Notice of Intent to Participate filing fee that was more than double (a) the Register's Proposed Copyright Office Fee Schedule, sent to Congress February 1, 1999, and (b) the Register's Announcement of New Special Fees, § 708(a)(10), effective July 1, 1999. The highest filing fee in that document is $65.00. Their proposal is $150.00. The fee of $150.00 to the Music Claimants, based on their awards of millions of dollars, is de minimis. However, that proposal is a burden to those whose awards are millions of dollars less. Joint Supplemented Comments at 5. Another proposal of Music Claimants discriminately suggests that Offers of Judgment should " . . . apply *only* to small claims" (individual claimants) "matters," (Joint Comments at 6) [Emphasis added]. This is a classic example of economic discrimination.

As the Honorable Justice J. Stevens observed in his dissenting opinion:

> An arrangement that produces market wide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character. Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly in the scope of the statutory grant. *Id.* at 37. *BMI v. CBS*

All of the above anti-competitive cartelized actions and suggested actions violate the rule of reason. The aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

8. Further, both Ms. Evelyn and Mr. Cannings took issue with the fact that BMI and ASCAP represented as evidence records sales, tapes and CDs that were commercially distributed. This act is in clear violation of their respective Consent Decrees, Section IV(A).

> ASCAP is enjoined and restrained from:
> (A) [h]olding, acquiring, licensing, enforcing or negotiating concerning any rights in copyrighted musical compositions *other than rights of public performance* on a non-exclusive basis. *United States v. The American Society of Composers, Authors and Publishers,* Section IV(A) No. 13-95 (1950) [Emphasis added].
>
> BMI is enjoined and restrained from:
> Engaging in commercial publication or recording of music or in the commercial distribution of

> sheet music or recordings. *United States v. Broadcast Music, Inc. and RKO General, Inc.*, Civil No. 64-Civ-3787, Section IV(B).

9. Both Mr. Cannings and Ms. Evelyn raised another issue with the Librarian that is worth mentioning here. The AHRA was enacted on October 28, 1992. The Settling Parties overstated their claim by including sales for that year from January 1, 1998 to October 27, 1998. App., *infra*, 49a, 54a.

The sales before the date of enactment of the Act are clearly outside of its scope. The CARP's determination included these sales. The CARP's determination is, therefore, contrary to the statute. The Librarian is required by law (17 U.S.C. § 802(f)) to reject the CARP determination. In adopting the CARP's contrary to statute determination, the Librarian, based on the record, acted in an arbitrary manner. The reviewing court is required by law (§ 802(g)) to modify, enter its own determination, vacate or remand the arbitrary determination of the Librarian. The court of appeals failed to judiciously exercise its jurisdiction.

> The copyright statute ought to be reasonably construed with a view to effecting the purposes intended by Congress; they ought not to be unduly extended by judicial construction to include privileges not intended to be conferred. Nor should be narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant. *Bobbs-Merril Co. v. Straus*, 210 U.S. 28 S. Ct. 722, 52 L. Ed. 1086.

10. The resolution of this case turns on just this question. Yet it is in these cases with respect to that question that the court of appeals made its judgment to subject petitioners to a "relaxed" standard of review

beyond that authorized by the APA for the stated purpose of preserving the court's ability to review the Librarian's determination on the court's own reasoning. The court states that the standard "may become more rigorous over time as [he] acquires greater experience with the particular administrative scheme." *Id.* NAB 922. However, this relaxed scrutiny goes beyond that authorized by the APA. The court's decisions exceed the proper bounds of judicial review. The decisions' definitive adoption of an extra-statutory standard of review warrants review by this Court, which necessarily has greater detachment from the particular controversy about the respective roles of the agency and its reviewing court, as well as less reason for inhibition to depart from Federal Circuit precedent.

11. Proper administration of the copyright system plays an important role in the continuing intellectual, and hence economic, development of the Nation. When properly administered with the statutory requirements established by Congress, *see* 17 U.S.C., copyrights "promote the Progress of Science and useful Arts." (U.S. Const., Art. I, § 8, CL. 8). Just as surely, however, when improperly administered, it retards that progress, stifles copyright and economic competition, and may be invalidated, if at all, only through protracted and expensive litigation. *See generally* 17 U.S.C. § 501, *et seq.* and/or § 802(g). Infringement and Remedies (not applicable under compulsory licenses).

The final administrative responsibility for determining whether the Librarian "acted in an arbitrary manner," Title 17 U.S.C. § 802(g), should be subject to judicial review and "correction" only within the limited bounds

prescribed by Congress for the review of any administrative action.

There should be no doubt about the court of appeal's decisions in these cases. As the court acknowledged, "the deference that this approach accords to the Librarian's decision is usually wide" (*Id.* NAB at 924) – so "wide" in these cases it resulted in irreparable harm. One may expect that the standard of review will likewise be important, or determinative, in many other cases in which the Librarian has resolved close factual questions against a claimant. Indeed, as Judge Michel of the Federal Circuit has stated in a speech to members of the bar, "standards of review influence dispositions in the Federal Circuit far more than advocates realize." *See* Nard, *Deference, Defiance, and Useful Arts*, 56 Ohio St. L. J. 1415 & n.3 (1995). Thus like the burden of proof, which is similarly determinative at, but only at, the margin of close cases, the standard of judicial review will "rarely [be] without consequence and frequently may be dispositive." *Larine v. Milne*, 424 U.S. 577, 585 (1976). And, like the burden of proof, the standard of review is an inherent aspect of *every* litigated case.

Moreover, the court's decision ultimately rested, not simply on its choice of standards, but on an interpretation of 17 U.S.C. § 802(g) and the intent of Congress that, in the court's view, made that choice permissible. *See id.* NAB *passim* and App., *infra*, 1a-2a, 9a-11a. That flawed construction of a widely applicable statute has the potential to unsettle the law with respect to judicial review of additional federal agencies subject to the APA, inviting the other courts to inquire whether it is appropriate, in the absence of specific statutory language, to adopt "exceptionally deferential" standards of review should

the court deem it desirable to do so. In avowing its reasoning, the court of appeals has demonstrated an underlying approach to, and philosophy of judicial review that is inconsistent with, the letter and spirit of the APA. The court's decisions in these cases accordingly warrant review by this Court.

CONCLUSION

In the interest of justice the petition for a writ of certiorari should be granted.

Respectfully submitted,

James Cannings
Pro Se
Alicia C. Evelyn
Pro Se
May 5, 1999

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1250 **September Term, 1998**

James Cannings,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

American Society of Composers, Authors and Publishers, et al.,
Intervenors

ON PETITION FOR REVIEW OF AN ORDER OF THE LIBRARIAN OF CONGRESS

BEFORE: Wald, Randolph, and Garland, Circuit Judges

JUDGMENT

(Filed Mar. 2, 1999)

This petition for review of an order of the Librarian of Congress was considered on the briefs and appendices filed by the parties. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the petition for review, insofar as it is against the Register of Copyrights,

be dismissed. *See National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (1998) (17 U.S.C. § 802(g) limits court's review to Librarian's decisions). It is

FURTHER ORDERED AND ADJUDGED that the petition for review against the Librarian of Congress be denied. *See National Ass'n of Broadcasters*, 146 F.3d at 918, 924 (noting exceptionally deferential standard of review; award will be upheld if Librarian offers facially plausible explanation bearing rational relationship to record evidence). The Librarian's decision to adopt the Copyright Arbitration Royalty Panel's ("CARP") method for calculating the amount of royalties was rational. The CARP reasonably selected the internal distribution methodology of Broadcast Music, Inc., as the best available evidence of a simulated market. In addition, the Librarian's refusal to award pre-judgment interest was rational, given the lack of precedent for such an award.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1250 **September Term, 1998**

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* D.C. Cir. Rule 41.

Per Curiam

/s/ W, R, G

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1250 **September Term, 1998**

James Cannings,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

American Society of Composers, Authors and Publishers, et al.,
Intervenors

BEFORE: Wald, Randolph, and Garland, Circuit Judges

ORDER

(Filed Feb. 16 1999)

Upon consideration of petitioner's motion to supplement the joint appendix; and intervenors' motion to supplement the joint appendix, the opposition thereto, and the reply, it is

ORDERED that the motions be granted. The Clerk is directed to file the lodged supplements to the joint appendix. It is

FURTHER ORDERED, on the court's own motion, that the court will dispose of the petition for review

without oral argument on the basis of the briefs and appendices submitted by the parties. The court has determined that oral argument will not assist it in this case. *See* D.C. Cir. Rule 34(j).

Per Curiam

/s/ W, R, G

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119 **September Term, 1998**

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed Feb. 4 1999)

Upon consideration of the petitions for rehearing *En Banc* of petitioners Evelyn and Cannings, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119 **September Term, 1998**

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

BEFORE: Silberman, Henderson and Tatel, Circuit Judges

ORDER

(Filed Feb. 4 1999)

Upon consideration of the petitions for rehearing of petitioners Evelyn and Cannings, filed December 21, 1998, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119 **September Term, 1998**

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

ORDER

(Filed Jan. 6, 1999)

Upon consideration of the motions of petitioner Evelyn for leave to file a petition for rehearing and petition for rehearing in banc and a corrected petition for rehearing and petition for rehearing in banc, it is

ORDERED that the motions are granted.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119 **September Term, 1998**

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

ON PETITION FOR REVEW OF AN ORDER OF THE LIBRARIAN OF CONGRESS

BEFORE: Silberman, Henderson and Tatel, Circuit Judges

JUDGMENT

(Filed Nov. 4 1998)

These consolidated petitions for review of the orders of the Librarian of Congress, filed May 9, 1996 and February 12, 1997, were considered on the briefs and the appendices filed by the parties. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the petitions for review, insofar as they are against the Registrar of Copyrights, be dismissed. *See National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (1998) (17 U.S.C. § 802(g) limits court's review to Librarian's decisions). It is

FURTHER ORDERED AND ADJUDGED that the petitions for review against the Librarian of Congress be denied. *See National Ass'n of Broadcasters*, 146 F.3d at 918, 924 (noting exceptionally deferential standard of review; award will be upheld if Librarian offers facially plausible explanation bearing rational relationship to record evidence). The court finds nothing in petitioners' claims warranting modification or remand of the Librarian's orders on review.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119 **September Term, 1998**

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

/s/ W, R, G

APPENDIX G

Federal Register/Vol. 63, No. 79/Friday, April 24, 1998

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 94-3 CARP CD 90-92]

Determination of the Distribution of the 1991 Cable Royalties in the Music Category

AGENCY: Copyright Office, Library of Congress.

ACTION: Order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing resolution of a Phase II controversy and distribution of 1991 cable royalty funds in the music category. The Librarian is adopting the determination of the Copyright Arbitration Royalty Panel (CARP).

EFFECTIVE DATE: April 24, 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William Roberts, Senior Attorney, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

Recommendation of the Register of Copyrights

I. Background

Section 111 of the Copyright Act, 17 U.S.C., grants a compulsory copyright license to cable systems to retransmit the over-the-air signals of broadcast stations licensed by the Federal Communications Commission. Cable systems submit statements of account and royalty payments to the Copyright Office on a semi-annual basis. The royalties are deposited with the United States Treasury for subsequent distribution to owners of copyrighted works retransmitted by the cable systems.

Distribution of cable royalty fees is conducted in two phases. In Phase I, the fees are divided among categories of copyright owners. There are currently eight copyright owner claimant groups represented in Phase I proceedings: Program Suppliers (movies and syndicated television programs); Joint Sports Claimants (sports programs of the National Basketball Association, Major League Baseball, the National Hockey League, and the National Collegiate Athletic Association); the National Association of Broadcasters (broadcast stations); the Devotional Claimants (religious programming); the Public Broadcasting Service (public television); National Public Radio (public radio); the Canadian Claimants (Canadian program owners); and the Music Claimants (songwriters and music publishers).

Phase II involves distribution of royalty fees to individual copyright owners within a category. This proceeding involves distribution to claimants within the music category.

On October 28, 1996, the Librarian announced the final Phase I distribution of cable royalties collected for 1990, 1991 and 1992. Of the total royalties collected (more than $500 million), 4.5% of the fees for each year was distributed to the music category.[1] 61 FR 55653 (October 28, 1996). Music Claimants, consisting of the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. (SESAC), represented the music category and received the Phase I royalty distribution award. Order in Docket No. 93-3 CARP CD 90-92 (August 3, 1995).

On February 15, 1996, the Library of Congress published a notice requesting interested parties to comment on the existence of Phase II controversies for distribution of the 1990-1992 cable royalty funds. 61 FR 6040 (February 15, 1996). The parties who filed comments and Notices of Intent to Participate identified two unsettled categories that would require resolution before a CARP. The first controversy involved distribution of the 1991 cable royalty fees between James Cannings and Can Can Music (Cannings) and the Music Claimants. Music Claimants represent all songwriters and music publishers in the music category for distribution of the 1991 cable fees, with the exception of Cannings. The second controversy

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[1] The 4.5% figure was achieved through settlement negotiations between the Music Claimants and the other seven claimant groups.

involved distribution of the 1990-1992 cable fees between the National Association of Broadcasters (NAB) and the Public Broadcasting Service (PBS). On June 3, 1997, NAB and PBS notified the Copyright Office that they had reached settlement concerning all matters related to their Phase II dispute over distribution of the 1990-1992 royalty funds, thus leaving a single dispute for resolution by a CARP.

On August 28, 1997, the Library convened a CARP to resolve the dispute between Cannings and the Music Claimants for distribution of the 1991 cable fees. 62 FR 45687 (August 28, 1997). After considering the evidence presented by the parties, the CARP delivered its written decision to the Librarian, as required by 17 U.S.C. 802(e), on February 26, 1998. The Panel awarded Cannings $63.74 and awarded the remainder of the 1991 fees[2] to the Music Claimants.

Cannings filed a petition to modify the decision of the CARP, as permitted by 37 CFR 251.55(a). The Music Claimants and Broadcast Music, Inc. (BMI) filed replies, as permitted by 37 CFR 251.55(b).

Section 802(f) of the Copyright Act provides that "[w]ithin 60 days after receiving the report of a copyright arbitration royalty panel * * * , the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel." 17 U.S.C. 802(f). Today's order of the Librarian fulfills this statutory obligation.

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[2] The remainder of the fees is 4.5% of the total cable fees collected for 1991 minus, of course, Cannings' award.

II. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his narrow scope of review of CARP determinations. See 62 FR 55742 (October 28, 1997) (satellite rate adjustment); 52 FR 6558 (February 12, 1997) (DART distribution order); 61 FR 55653 (October 28, 1996) (cable distribution order). The salient points regarding the scope of review, however, merit repeating.

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: the Librarian and the Court of Appeals for the District of Columbia Circuit. Section 802(f) directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." Id. If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is different from the

"arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

> (1) Relies on factors that Congress did not intend it to consider;
>
> (2) Fails to consider entirely an important aspect of the problem that it was solving;
>
> (3) Offers an explanation for its decision that runs counter to the evidence presented before it;
>
> (4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
>
> (5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
>
> (6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983); *Celcom Communications Corp. v. FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is "arbitrary," prior decisions of the Court of Appeals for the District of Columbia Circuit reviewing

the determinations of the former Copyright Royalty Tribunal have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. *See Recording Industry Ass'n of America v. CRT*, 662 F.2d 1 (D.C. Cir. 1981); *National Cable Television Ass'n v. CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Christian Broad. Network v. CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Ass'n of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985). As one panel of the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully * * *

Christian Broad. Network, Inc. v. CRT, 720 F.2d 1295, 1319 (D.C. Cir. 1983), quoting *National Cable Television Ass'n v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented with a rational analysis of the CARP's decision, setting forth specific findings of fact and conclusions of law. This

requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 286, at 13 (1993). Thus, to engage in reasoned decision-making, the CARP must "weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Ass'n v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broad. Network, Inc. v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

III. Review of the CARP Report

Section 251.55(a) of the rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination." 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of petitions. 37 CFR 251.55(b).

Cannings, who appeared *pro se* in this proceeding on behalf of himself and Can Can Music, filed a petition to modify requesting that he be awarded his original claim of $2,400, plus interest. Music Claimants opposed Cannings' petition, and requested the Librarian affirm the decision of the Panel. BMI also filed a "supplemental reply," asking the Librarian to clarify a statement made by the Panel in its report.

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the Copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the * * * distribution of fees." 17 U.S.C. 802(f).

IV. Review and Recommendation of the Register of Copyrights

A. Determination of the Panel

The Panel's report articulates both the legal and factual basis for resolving this Phase II proceeding. The Copyright Act does not provide standards for determining how cable royalty fees are to be divided among various claimants, leaving that task instead to individual CARPs acting "on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal,

prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)." 17 U.S.C. 802(c). After examining the "simulated market" approach utilized by the Phase I CARP to divide the cable royalties among the various copyright owner categories, the Panel determined that a similar approach was warranted in this proceeding. The Panel stated:

> The evidence and arguments presented here focus essentially on market value. However, the opportunity for negotiations concerning what cable systems [sic] operators would have to pay for those segments of programs during which the works of each *individual* music claimant was performed has been superseded by the compulsory licensing system. Therefore it will be our task to hypothesize as realistic a simulated market for the works of individual music claimants as is consistent with the evidence presented.

Panel Report at 7.

After establishing a "simulated market" approach as its legal basis for determining the distribution, the Panel examined the factual basis for Cannings' and the Music Claimants' claims to the 1991 cable royalty fees. The Panel determined Cannings' claim to rest upon a single musical composition, "Misery," that was transmitted on two occasions in 1991 as part of the "Joe Franklin Show" on broadcast station WWOR-TV. With respect to the Music Claimants, the Panel determined that they represented all other claimants in the music category and that, after determining Cannings' share of the royalties, all remaining monies belonged to the Music Claimants. Id. at 8.

After adopting this approach to the distribution, the Panel sought a means for determining Cannings' share of the 1991 cable royalties. The Panel rejected Cannings' claim of $2,400, which was based upon an independent arbitrator's award of $4,800 to Cannings for four performances of his musical work "Reggae Christmas" on WWOR-TV during the 1980's. This private arbitration award was the result of a dispute between Cannings and BMI when Cannings was a member of that performing rights organization. In making the award, the independent arbitrator did not issue a written statement of his findings of facts or conclusions, as is required in a CARP proceeding. The Panel stated:

> As a basis for Cannings' claim in this proceeding, the arbitration award, confirmed by the court or not, can carry no weight. Cannings expressly disavows any claim of collateral estoppel, but presents the award "as precedent to support how to calculate his royalty distribution." However, we cannot defer to the award. To do so would mean abdicating our duty under § 802(c) of the copyright law to act "on the basis of a fully documented written record * * *." We understand this duty to require our own examination and analysis of the evidence presented. While Cannings has made certain representations as to what evidence he presented to the arbitrator, we have no way of knowing how the arbitrator evaluated any of the evidence or what factors he considered in arriving at his award. We note, however, that the award was based on performances of a different song from the one the performance of which is the basis for the claim involved here. Were we privy to the arbitrator's analysis, we might legitimately assess

> its persuasiveness for purposes of this proceeding. Absent that, deference to his award would require us simply to adopt the arbitrator's ultimate valuation of four performances of a Cannings' song. This we cannot do.

Id. at 10.

The Panel also rejected Cannings' own analysis of the distribution formula used by BMI to pay its members for performances on network television broadcast stations. Cannings presented a distribution proposal that purported to adjust for the difference between the number of commercial television stations in the country and the number of cable systems that carry WWOR-TV. The Panel concluded that Cannings' methodology did not shed light on the market value of musical performances on WWOR-TV as retransmitted by cable systems, because WWOR-TV is not a network and Cannings did not offer persuasive evidence that retransmissions of WWOR-TV are of equal value to retransmissions of network stations. Id. at 11.

The Panel also rejected Cannings' references to his prominence in the music industry as evidence of market value, noting that Music Claimants presented considerable evidence to rebut such prominence. The Panel stated that prominence in the music industry, if any, would only have a bearing on market value if such prominence affected a cable system's decision to carry WWOR-TV. It concluded that "Cannings" pre-1991 history of four performances on WWOR in six years does not suggest that such a consideration played a meaningful part here." Id. at 12.

Finally, the Panel asserted that all of Cannings' approaches are flawed because they do not evidence a consideration of the constraints imposed on each copyright owner's share by the fixed and finite nature of the fund being shared. Rather, Cannings' approach is geared toward hypothetical open market negotiations, and thus is not reflective of a compulsory license royalty pool. Id. at 12-13.

The Panel assessed Music Claimants' assertion that Cannings is entitled to no more than $9.99 for each of his two performances on WWOR-TV. Music Claimants derived this value from a durational analysis that extrapolated the value of all musical works aired on WWOR-TV during 1991 on a per minute basis. After calculating that each minute of music on WWOR-TV was worth $7.49, Music Claimants asserted that each performance of "Misery" was worth $9.99, because it lasted one minute and twenty seconds. The Panel, however, rejected Music Claimants' approach:

> The durational analysis is neither one that has been shown to have been used for distributions nor is there applicable precedent in contested proceedings for adopting such an approach. In fact, [Music Claimants] does not endorse this analysis as appropriate for resolving any allocation dispute not arising out of the specific circumstances of this case, stating rather faintly that where, as here, only two performances and a small amount in controversy are involved, "the Panel may use the durational analysis as the basis for resolving [the] dispute."

Id. at 15-16. The Panel also rejected Music Claimants' assertion that the 1992-1994 DART distribution proceeding, Docket No. 95-1 CARP DD 92-94, is precedent for using a durational analysis, noting that the mathematical distribution formula used in that proceeding was consistent with the Copyright Act's direction to base DART distributions upon transmissions and distributions of sound recordings. Id. at 17.

The Panel determined that the best "simulated market" for determining Cannings' share of the royalties in this proceeding is "a market within which we have evidence that real-life transactions occur." Id. at 17. The Panel asserted that the only evidence in the record of a "real-life" market transaction for musical works is the methodology used by BMI for paying its affiliated songwriters and publishers. BMI paid a distant signal rate of $14.36 to the songwriter and to the publisher for a featured performance on WWOR-TV in 1991. The Panel determined the two performances of "Misery" to be featured performances. BMI increased its standard base rate in the third quarter of 1991, resulting in additional combined songwriter/publisher rate of $3.15. The Panel concluded that Cannings was entitled to $14.36 as a songwriter, $14.36 as a music publisher, and the additional combined songwriter/publisher rate of $3.15, for each of the performances of "Misery" in 1991. The total of these two performances amounted to $63.74, which is what Cannings would have received from BMI had he remained a member. Id. at 19. The Panel determined that BMI's own distribution methodology was superior to Music Claimants' durational analysis, and rejected Music Claimants' contention that Cannings should not have his

award calculated in accordance with BMI's methodology because he rejected it while a member of BMI. Id. at 20.

In awarding Cannings $63.74, the Panel determined that he was not entitled to interest because interest "has not been awarded in previous Phase II proceedings," and because the Panel "found no supportable method to award or compute interest, nor has Cannings presented adequate grounds for such an award." Id. at 21.

B. Petitions To Modify

1. Cannings

Cannings filed a petition to modify the determination of the CARP. The Music Claimants did not file a petition to modify, but did file a reply to Cannings' petition. In addition, BMI filed what it styled as a "supplemental reply" requesting that the Librarian modify a certain statement of the Panel concerning the music durational analysis that BMI prepared. The Register recommends that BMI's "supplemental reply" be stricken as improperly filed.[3]

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[3] The appropriate manner to request modification of a CARP's decision or, as in this case, a statement made by the Panel, is to file a petition to modify in accordance with § 251.55(a). The purpose of replies is to allow parties to respond to assertions and arguments made by those submitting petitions to modify. BMI's "supplemental reply" does not challenge an assertion or argument raised by Cannings' petition, but rather challenges a statement made by the Panel. BMI should, therefore, have filed a petition to modify. Because it did not, its "supplemental reply" is improperly filed.

Cannings requests that the Panel's award of $63.74 be overturned and that he be awarded his original claim of $2,400, plus interest. The principal basis for his request is the circumstances surrounding the independent arbitrator's award he received in 1993 from a dispute with BMI over four performances of another Cannings' song, "Reggae Christmas," on WWOR-TV during the 1980's while he was still a member of BMI. Cannings received $4,800 in that arbitration proceeding which, according to his calculation, means that a single performance of a Cannings work on WWOR-TV is worth a minimum of $1,200. Although Cannings cannot point to any written determination of his BMI award that explains the arbitrator's reasoning, he argues that the arbitrator must have accepted in its entirety as true his evidence and methodology for calculating the value of his performances. Cannings' methodology consisted of multiplying $1.50, the rate he submitted that BMI assigns to featured performances of musical works on network television, times 3000, the number of cable systems that Cannings alleged to be carrying WWOR-TV. He apparently submitted this methodology to the independent arbitrator in a June 3, 1993, letter. Cannings asserts that the Panel in this proceeding "suppressed" the June 3, 1993, letter, even though the Panel expressly admitted it into evidence, along with his other submissions to the independent arbitrator.

Cannings challenges the Panel's assertion that it must formulate a "simulated market" in order to calculate the value of his Phase II claim. Cannings asserts that the "simulated market" approach is contrary to CARP precedent, in contravention of 17 U.S.C. 802(c), though he

offers no explanation as to how or why it is contrary, except to note that the Phase I CARP in the 1990-1992 cable distribution proceeding used the same approach in determining values for programming categories. Cannings also challenges the Panel's statement that BMI's distribution methodology is a potential model for determining the simulated market. Cannings argues that in making this statement, the Panel acknowledged that BMI's methodology did not provide the complete picture of a simulated market, and therefore should not be used at all.

Cannings submits that the Panel should not have used BMI's distribution methodology because the independent arbitrator did not use it in the 1993 distribution proceeding. He states that the $4,800 he received from the arbitrator is the only credible evidence of market value in this proceeding. In addition, Cannings asserts that $1.50 was not BMI's rate for a feature performance on a commercial station in 1991, though he does not state what he believes the rate to have been. Cannings does state that the $1.50 rate includes BMI's administrative costs and that, because he no longer is a BMI member, the rate should be adjusted upwards. Cannings, however, does not state what the proper rate should be.

With respect to the Panel's determination not to award Cannings interest on his claim, Cannings asserts that 17 U.S.C. 111(d)(2) provides that he is entitled to interest. Cannings also cites the provision of the Copyright Office distribution order (which distributed the Phase I monies to the Music Claimants after they notified the Office that they had reached settlement with the other Phase I parties) that states that as a condition of the

distribution, Music Claimants agree to return any overpaid amounts with interest. Regarding calculation of the proper amount of interest owed, Cannings submits that he asked the Panel to award him interest from the date of initial investment with the U.S. Treasury of the 1991 cable funds by the Copyright Office, and that he provided the Panel with an "Interest Rate Table" obtained from the Copyright Office for each deposit of 1991 cable royalties made with the Treasury.

Finally, Cannings alleges that he was a victim of racial bias and discrimination in this proceeding because he is black and is a *pro se* litigant. He describes the chairperson of the Panel as acting "impetuously" toward him in the prehearing conference. No other facts or circumstances are offered as evidence of discrimination or bias.

2. Music Claimants Reply

Music Claimants assert that the award to Cannings is proper and clearly fits within the "zone of reasonableness" afforded CARP decisions.

Music Claimants state that the Panel properly rejected reliance upon the independent arbitration award because that private arbitration did not set a rate for distant signal performances on WWOR, but rather was a private contractual proceeding between BMI and Mr. Cannings brought pursuant to Mr. Cannings' BMI affiliation agreement. Music Claimants assert that the BMI arbitration is not recognized precedent in CARP proceedings and that to have blindly followed it would amount to an

abdication of the Panel's responsibility to determine the correct distribution in this proceeding.

Music Claimants assert that Cannings' methodology for calculating the value of his two performances on WWOR-TV is fatally flawed and discriminatory, because it would result in the value of a Cannings performance being nearly forty times the value of an identically situated BMI affiliate whose work was performed on WWOR-TV. Music Claimants also state that the BMI distribution methodology used by the Panel in this proceeding is an accurate representation of market rate, and that it was correct for the Panel to use the distribution formula in determining the "simulated market" for works in this proceeding.

With respect to interest, Music Claimants argue that the Panel correctly refused him an interest award because Cannings failed to present credible evidence of entitlement. The Copyright Office "Interest Rate Table" submitted by Cannings is interest charged to cable operators for late compulsory license payments, not interest paid to individual copyright claimants in Phase II proceedings.

Finally, Music Claimants state that Cannings' charges of bias and discrimination are outrageous and unsupportable.

C. Review of the Panel's Determination

After reviewing the Panel's report and record in this proceeding, the Register concludes that the Panel did not act arbitrarily or contrary to the provisions of the Copyright Act in determining the value of Cannings' Phase II

cable royalty claim as $63.74. Consequently, the Register recommends that the Librarian affirm the $63.74 award to Cannings, and directs the Music Claimants to pay him that amount.

1. The Value of Cannings' Claim

As summarized above, the centerpiece of Cannings' claim for $2,400 in Phase II cable royalties is the BMI arbitration proceeding involving a total of four performances of "Reggae Christmas" on WWOR-TV during the 1980's. The Panel rejected the BMI arbitration award as evidence of the value of a Cannings performance under the section 111 compulsory license because the BMI award was issued without explanation, was not a CARP or Copyright Royalty Tribunal proceeding, and involved a different musical work. The Register finds this determination of the Panel to be neither arbitrary nor contrary to the provisions of the Copyright Act. Private arbitration awards have no precedential weight in CARP proceedings. See 17 U.S.C. 802(c) (only prior CARP and Copyright Royalty Tribunal decisions, and rulings of the Librarian, have precedential value). The BMI arbitration award, and the circumstances surrounding it, are therefore probative in this proceeding only to the extent that the award sheds light on the value of two performances of "Misery" in 1991 on WWOR-TV. The Panel was well within its discretion to reject the BMI arbitration award as evidence, particularly where it involved a different work,

performed in different years, and was made without any written explanation.[4]

The Panel did not act arbitrarily or contrary to the Copyright Act by adopting the approach of a "simulated market" in valuating Cannings' claim. The Copyright Act does not offer guidance as to how cable compulsory license revenues are to be divided among copyright owners. The Phase I CARP for the distribution of 1991 cable royalties used a "simulated market" approach in dividing the royalties among Phase I claimants and, contrary to Cannings' assertion, there is no prohibition on the use of that approach in Phase II proceedings. In fact, while not describing it as such, the Copyright Royalty Tribunal took a decidedly marketplace value approach in making its cable Phase II awards. See e.g., 53 FR 7132 (March 4, 1988) (1985 cable Phase II).

The Panel selected BMI's internal distribution methodology as the best evidence of a simulated market in valuing the retransmission of musical works by cable systems. Cannings contends that the only evidence in the record of an actual marketplace transaction involving his works is the BMI arbitration award. Arbitration awards are not direct evidence of marketplace value. If arbitrations are surrogates for marketplace value at all, it is only because they become necessary where the market has

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[4] Cannings' assertion in his petition to modify that the evidence he submitted to the independent arbitrator was "suppressed" in this proceeding is belied by the fact that the Panel did accept Cannings' evidentiary submissions on the BMI arbitration and addressed them in its decision. See Panel Report at 9-10.

failed – i.e. the buyer and seller are unable to negotiate the compensation paid. BMI's distribution methodology represents a consensus approach endorsed by thousands of BMI's songwriter and music publisher members. While there are undoubtably disgruntled BMI members who feel, like Cannings, that the compensation paid is too low, this is not conclusive evidence that BMI's distribution methodology is not probative evidence of the market value of cable retransmissions of musical works. The Panel was well within its discretion to credit BMI's distribution methodology and adopt its approach.

With respect to Cannings' allegations of racial bias and discrimination, Cannings has offered no evidence in support of these contentions, and the Register cannot find any evidence in the record suggesting bias or discriminatory action. Cannings' charge of "impetuous" behavior on the part of the Chairman of the Panel towards him during the pre-hearing conference neither proves nor suggests improper behavior, and there is no supportable reason for overturning the decision of the Panel on these grounds. If anything, the Panel was exceedingly flexible and accommodating in allowing Cannings to make his case in this proceeding.

In summary, the Register determines that the Panel did not act arbitrarily or contrary to the Copyright Act in valuing Cannings' Phase II claim at $63.74, and recommends that the Librarian adopt this determination.

2. Interest on Cannings' Award

Cannings requested that he be awarded interest on his claim, calculated from deposit of the 1991 cable royalties. Music Claimants assert that Cannings is not entitled to interest. The Panel did not award interest because it could not find any Copyright Royalty Tribunal precedent for doing so, and it could not find any "supportable method to award or compute interest." Panel Report at 21.

The Register determines that it was reasonable for the Panel not to award Cannings interest on his claim. Under Tribunal precedent, copyright owners were not entitled to a distribution of royalties, or any interest that had accrued on those royalties, until the Tribunal affirmatively determined their entitlement. See 50 FR 6028 (February 13, 1985) (1979-82 cable distribution) (Tribunal not "responsible for time value lost on an allocation which had not yet been determined"); 53 FR 7132 (March 4, 1988) (1985 Phase II cable distribution) (no interest given on dollar award to Asociacion de Compositores y Editores de Musica Latinoamericana). Consequently, there are no established grounds or methodology for awarding interest. Because there is no requirement that the Panel assess interest in this proceeding, the Register cannot conclude that the Panel acted arbitrarily or contrary to the Copyright Act by not awarding Cannings interest on his claim.

3. Award to Cannings

By Order dated August 3, 1995, the Copyright Office distributed the full amount of the music category's Phase I entitlement (4.5% of the total 1991 cable royalties) to the Music Claimants. Order in Docket No. 94-3 CARP CD 90-92). As a result, there were no funds retained to satisfy any Phase II award against the Music Claimants' royalties. However, the Order required reimbursement should an overpayment of royalties occur. The Music Claimants were overpaid $63.74, the amount of Cannings' award. The Register recommends that, in affirming the Panel's award, the Librarian order Music Claimants to pay Cannings $63.74 in satisfaction of his claim.

V. Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the Phase II controversy for the distribution of 1991 cable royalty fees, 17 U.S.C. 111, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's determination. The Librarian also dismisses the "supplemental reply" of BMI as untimely.

The Librarian orders that Music Claimants submit payment to James Cannings in the amount of $63.74, no later than May 15, 1998.

Dated: April 20, 1998.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 98-10923 Filed 4-23-98; 8:45 am]

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APPENDIX H

Federal Register/Vol. 62, No. 29/Wednesday, February 12, 1997

LIBRARY OF CONGRESS

Copyright Office
[Docket No. 95-1 CARP DD 92-94]
Distribution of the 1992, 1993, and 1994 Musical Works Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the distribution of the royalty fees collected for Digital Audio Recording Devices and Media (DART) in the 1992, 1993, and the 1994 Musical Works Funds. The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP).

EFFECTIVE DATE: The distribution percentages announced in this Order are effective on February 12, 1997.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, DC. 20540.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, or Tanya M. Sandros, Attorney-Advisor, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

I. Recommendation of the Register of Copyrights

Background

On October 28, 1992, Congress enacted the Audio Home Recording Act, Public Law No. 102-563 (1992). This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are collected by the Copyright Office and deposited with the Treasury of the United States. 17 U.S.C. 1005. These funds are distributed by the Copyright Office to interested copyright parties who filed claims with the Copyright Office each year during January and February pursuant to either a universal settlement negotiated by the claimants to a particular subfund, or by Order of the Librarian of Congress (Librarian) following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel (CARP).

The Act provides that the royalties are to be divided into two funds: the Sound Recordings Fund, which accounts for $66^{2}/_{3}\%$ of the royalties, and the Musical Works Fund, which accounts for the remaining $33^{1}/_{3}\%$ of

the royalties. The Act further divides each fund into subfunds.

The Sound Recordings Fund consists of four subfunds, two of which, the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund, account for 2⅝% and 1⅜%, respectively, of the Sound Recordings Fund and are administered by an independent administrator. The remaining 96% of the Sound Recordings Fund is further distributed between two additional subfunds, the Featured Recording Artist Subfund and the Sound Recording Owners Subfund, which receive 40% and 60%, respectively, of the remaining 96% share of the fund. The Musical Works Fund consists of two subfunds, the Publishers Subfund and the Writers Subfund, each of which receives 50% of that Fund. 17 U.S.C. 1006(b).

Thus, the Act establishes the percentages for each fund and subfund, but directs the CARPs, when necessary, to determine what amount each claimant within a subfund is entitled to receive. The determination and a full explanation underlying the conclusions are set out in a written report to the Librarian.

Distribution of Royalties

Royalties are collected on a quarterly basis from any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured in or imported into the United States. 17 U.S.C. 1003(c). As discussed above, these royalties are collected by the Copyright Office and invested in interest-bearing securities with the United

States Treasury for subsequent distribution to interested copyright parties. 17 U.S.C. 1005.

An interested copyright party must submit each year a written claim to the Copyright Office during the months of January and February. 17 U.S.C. 1007(a). Within 30 days after the last day for filing claims, the statute instructs the Librarian to ascertain whether there are any controversies among the claimants as to the proper distribution of the royalties in their fund/subfund. If there are no controversies, the Librarian authorizes the distribution of the funds according to the terms of the negotiated agreements; otherwise, the Librarian is directed to convene a CARP or CARPs to decide the proper distribution of the royalties in each unresolved fund/subfund. 17 U.S.C. 1007(b)(c).

This Proceeding

The parties in this proceeding are Broadcast Music, Inc., the American Society of Composers, Authors, and Publishers, SESAC, Inc., the Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association, Inc.), Copyright Management Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively, the "Settling Parties"), and two pro se claimants, Eugene Curry and Alicia Carolyn Evelyn. Ms. Evelyn and Mr. Curry, both songwriters, chose to represent their own interests in the proceeding. Mr. Curry also represented the publishing interest of Tajai Music, Inc. (Tajai) for the three years in dispute. The Settling Parties represent the over 264,000 remaining publishers and songwriters with a

claim to a share of the royalties. Settling Parties Direct Case at 2-3.

The CARP in this proceeding was convened to determine the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds, which totaled approximately $355,500.00.[1] The Copyright Office received forty-one claims to the 1992 Musical Works Fund – twenty-one claims to the Writers Subfund and twenty claims to the Publishers Subfund. During the next filing cycle, the Office received twenty-two claims to the 1993 Musical Works Fund – twelve claims to the Writers Subfund and ten claims to the Publishers Subfund. In 1995, the Office received twenty-six claims to the 1994 Musical Works Fund, equally divided between the two subfunds.

This proceeding for the determination of the distribution of the DART royalties commenced on November 3, 1993, when the Settling Parties filed a motion with the Copyright Royalty Tribunal (Tribunal)[2] to consolidate the 1992 and 1993 DART distribution proceedings. The CRT

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[1] Claimants to the royalties in the Sound Recordings Fund for 1992, 1993, and 1994 negotiated a settlement amongst themselves. The Library has made a full distribution of these funds to the interested copyright parties who filed timely claims for a share of these royalties. *See* Order, Docket No. 94-2 CARP-DD (December 15, 1994) and Order in Docket No. 95-1 CARP DD 92-94 (May 16, 1995).

[2] When the Audio Home Recording Act was passed, the Copyright Royalty Tribunal had the authority to conduct the DART distribution proceedings. The Tribunal, however, was abolished by Congress in 1993, and the authority to distribute DART funds was given to the CARPS, as administered by the Librarian of Congress. *See* the Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198.

granted this motion on November 29, 1993, see Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993), but further proceedings were suspended upon the abolition of the CRT.

The Copyright Office instituted a new proceeding for the distribution of 1992 and 1993 DART royalties on March 1, 1994. 59 FR 9773 (March 1, 1994). In response to this notice, the Settling Parties and other claimants filed a motion with the Office requesting the Office to consolidate the 1992, 1993, and 1994 DART distribution proceedings. The Office granted this request and announced that it would set a schedule for a DART distribution proceeding in 1995. 59 FR 35762 (July 13, 1994).

On February 23, 1995, the Office published a notice requesting comments as to the existence of controversies in the consolidated proceeding, and notices of intent to participate. 60 FR 12251 (March 6, 1995). Twelve parties filed notices of intent to participate in this proceeding, including the Settling Parties, Ms. Evelyn, Mr. Curry and the publishing company he represents, Tajai.

Through a series of motions to dismiss certain parties and as a result of continued negotiations, nine parties remained in the DART distribution proceeding when the Librarian initiated a CARP to determine the distribution of the Musical Works Fund royalties for 1992, 1993, and 1994. 61 FR 40464 (August 2, 1996).

On October 4, 1996, the Parties met with the Panel which determined, for good cause shown, to proceed on

the basis of the written pleadings alone.[3] CARP Order, Docket No. 95-1 CARP DD 92-94 (October 4, 1996). Accordingly, the CARP instructed the parties to file their respective proposed findings of fact and conclusions of law by November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to the material contained in the written direct cases previously filed on March 25, 1996. Transcript of October 4, 1996 Meeting at 33-35.

On December 16, 1996, the chairperson of the CARP delivered the Panel's written report to the Librarian.

The CARP Report

The Panel, after reviewing the written record, determined that the royalties in the 1992, 1993, and 1994 Musical Works Funds should be allocated as follows:

To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

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[3] On June 14, 1996, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of the written pleadings. The Librarian denied the motion, but designated the issue to the CARP for further consideration under their authority to suspend or waive the relevant provision of the regulations. Order, Docket No. 95-1 CARP DD 92-94 (July 25, 1996).

To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993; and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994. CARP Report, paras. 71-73.

The Panel utilized the only formula presented for calculating a claimant's share of the royalties. CARP Report, para. 53. The formula determines each claimants' proportionate share of the royalties as a percentage of the total song titles sold during a particular year based on evidence of a claimants' total song title sales for that year. *Id.*

Standard of Review

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: The Librarian of Congress, and the Court of Appeals for the District of Columbia Circuit. Section 802(f) of the Copyright Act directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that is subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

(1) Relies on factors that Congress did not intend it to consider;

(2) fails to consider entirely an important aspect of the problem that it was solving;

(3) Offers an explanation for its decision that runs counter to the evidence presented before it;

(4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

(5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; or

(6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29 (1983); *Celcom Communications Corp. v. FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a decision is "arbitrary," prior decisions of the Court of Appeals for the District of Columbia Circuit reviewing the determinations of the former Copyright Royalty Tribunal (Tribunal) have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its decision. *See National Association of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network v. CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Association v. CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Association of America v. CRT*, 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully * * *.

Christian Broadcasting Network, Inc. v. CRT, 720 F.2d 1295, 1319 (D.C. Cir. 1983), *quoting National Cable Television Association v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal's decisions, he must be presented by the CARP with a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 286, 103d Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decision-making, the CARP must "weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Association v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc. v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register of Copyrights to review the CARP report and make her recommendation to the Librarian as to whether the report is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

Petitions To Set Aside the Panel's Determination

On January 2, 1997, and on January 3, 1997, the two pro se parties filed their petitions with the Librarian to modify and/or set aside the decision of the CARP, along with motions requesting leave to file the petitions late. *See* 37 CFR 251.55(a). The Office accepted the late filings and issued an order requesting that any replies to the petitions be filed with the Office no later than January 17, 1997. Order, Docket No. 95-1 CARP DD 92-94 (January 3, 1997). The purpose of the petitions to modify or set aside the Panel's determination is to identify aspects of the Panel's report which are arbitrary with respect to record evidence or contrary to the applicable statutory provisions.

In her petition, Ms. Alicia Evelyn enumerated an array of reasons to set aside the determination of the CARP in this proceeding, stating that "[t]he panel, in its report, failed to address matters in controversy * * * ." Petition to Set Aside the Determination of the Copyright Arbitration Royalty Panel in the Above-Referenced Matter Submitted by Alicia Carolyn Evelyn, Individual, Pro Se, Claimant (Evelyn Petition) at 2. The purported controversies which the CARP failed to address include: (1) Failure on the part of the Settling Parties to identify their DART eligible associates and members and at least one DART eligible title for the 1992-94 period, *Id.* at 2; (2) failure on the part of the Settling Parties to provide data to individual claimants pertaining to their DART eligible songs, including, but not limited to the songs "I'm Counting on You" and "I Thank You," *Id.* at 3; (3) selection of SoundScan to determine the extent of record sales rather than use of performance data, *Id.* at 7; (4) use by Mr.

Michael Fine[4], expert witness for the Settling Parties, of an incomplete list of DART eligible songs when evaluating SoundScan data for record sales of Ms. Evelyn, *Id.* at 7; (5) unexplained use of total record sales, as reported by SoundScan, for 1992, rather than record sales for the relevant period, October 28, 1992 – December 31, 1992, and concomitant use of total record sales for the claimant during this same period, *Id.* at 7-8; (6) failure to include record club sales and/or computer sales in the calculations for total record sales, *Id.* at 8; and (7) failure on the part of certain Settling Parties to fulfill their fiduciary obligations toward their members. *Id.* at 9-10.

Whereas Ms. Evelyn's petition stated her concerns with certain particularity, Mr. Curry's petition to set aside the panel's determination rests primarily on a fundamental assertion that the Settling Parties never proved their case. Petition to Set Aside the Determination of the Arbitration Royalty Panel, submitted by Eugene Curry (Curry Petition), at 1. Mr. Curry argues that he had to submit specific titles of his works and documentation of record sales whereas the Settling Parties produced no hard numbers for the record sales of any claimant represented by the Settling Parties. *Id.* at 2,3,4. Curry further argues that it was error for Ms. Smith[5] to supply Mr. Fine with authorship data and not present any data on the number of disseminations of his works through transmissions, i.e.

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[4] Mr. Fine is the Chief Executive Officer of SoundScan, Inc. Witness Affidavit, Settling Parties' Direct Case.

[5] Ms. Smith is Vice President of Performing Rights of Broadcast Music, Inc. Witness Affidavit, Settling Parties' Direct Case.

radio play, *id.* at 2, implying that the Panel failed to properly apply the statutory criteria for making its determination. Additionally, Mr. Curry submits that he supplied the Settling Parties with documentation of record club sales in support of his argument that SoundScan was not the only source of record sales data, nor the best source, but this information was not utilized in the final report to adjust the sales figures. *Id.* at 4.

In reply, the Settling Parties request that the Librarian deny Ms. Evelyn's and Mr. Curry's petitions on both procedural and substantive grounds. The Settling Parties contend that the Panel's report was not arbitrary or contrary to the law, when analyzed under the applicable standard of review, and therefore, should be adopted as filed by the Librarian. Furthermore, the Settling Parties oppose the Evelyn and Curry petitions because each petition failed to reference applicable sections of the party's proposed findings of fact and conclusions of law. *See* 37 CFR 251.55(a).

Sufficiency of Ms. Evelyn's and Mr. Curry's Petitions To Modify

Before the Register can address the issues raised by Ms. Evelyn's and Mr. Curry's petitions to modify the determination of the Panel, the Register must first address the contention raised by the Settling Parties that the petitions must be dismissed for failure to comply with section 251.55(a) of the CARP rules. That section provides that each petition must "state the reasons for modification or reversal of the panel's determination, and shall

include applicable sections of the party's proposed findings of fact and conclusions of law." 37 CFR 251.55(a).

Review of Ms. Evelyn's and Mr. Curry's petitions reveals that neither comply with the second part of the rule which requires identification of applicable portions of a petitioner's proposed findings of fact and conclusions of law. The purpose of this requirement is to enable the Register, and the Librarian, to locate those portions of the testimony that support each party's petition. However, absent a showing of bad faith, the remedy for failure to comply with the requirement is not dismissal of a party's petition to modify. Rather, the remedy is for the Register to direct the offending party to amend his or her petition to include identification of the applicable portions of their proposed findings of fact and conclusions of law. This approach, however, is not necessary in this proceeding because the record is relatively small. Therefore, Ms. Evelyn's and Mr. Curry's petitions to modify were accepted.

Review of the CARP Report

In reviewing the determination of a CARP, the Register is required to confine her consideration to the record of the proceeding. 17 U.S.C. 802(f). The record in this proceeding consists solely of the written direct cases of the Settling Parties, Ms. Evelyn, and Mr. Curry. Consequently, despite the protestations of Ms. Evelyn and Mr. Curry, the Register will not address issues raised in their petitions to modify which go beyond the evidence presented in the written direct cases.

The Register's review is in three parts: (1) An analysis of the statutory criteria to be used in the current proceeding; (2) an analysis of the methodology adopted by the Panel to implement the statutory criteria; and (3) an analysis of the application of the adopted methodology to the record evidence.

1. *Statutory criteria.* The Audio Home Recording Act of 1992 clearly delineates the statutory criteria to be considered when making a distribution of DART royalties. Specifically, a CARP may only consider "the extent to which, during the relevant period * * * each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. 1006(c)(2). While a CARP is limited to these two statutory criteria in determining a DART royalty distribution, the statute does not require the application of both criteria. Thus, in circumstances where the parties to a DART distribution have presented evidence as to only one of the criteria, there is no requirement that a CARP request evidence as to the second criteria as well.

In this proceeding, the parties presented credible evidence only as to the distribution criteria (record sales).[6] The Register concludes that the Panel acted properly in basing its determination solely on the evidence of record

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[6] The Panel found that while the Settling Parties and Mr. Curry did not present any evidence of performances, the evidence presented by Ms. Evelyn as to performances of her works was not competent. Report, paras. 46-47. After reviewing the record, the Register concludes that this determination by the Panel was not arbitrary.

sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determines that the Panel acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr. Curry that was not relevant to the section 1006(c)(2) criteria. *See*, CARP Report, para. 52.

2. *Methodology.* The Settling Parties presented the only systematic method for determining the distribution of the royalties in the Musical Works Funds. The formula divided the total song title sales credited to a claimant during a particular year by the total song titles sold during the same year. This calculation determines the claimant's proportionate share of the royalties for that period of time. The Panel found this formulation acceptable for making its determination because it allows each claimant to receive credit for actual sales during the relevant period. CARP Report, para. 54. Additionally, the Panel noted that Ms. Evelyn and Mr. Curry failed to propose any alternative systematic method or formula for calculating a claimant's share of the royalties. CARP Report, paras. 40 and 48.

Although neither Ms. Evelyn nor Mr. Curry challenge the Settling Parties' formula for determining each claimant's share of the royalties, Mr. Curry does challenge application of the formula solely to himself and Ms. Evelyn, – that is, not the Settling Parties. The Register concludes that the Panel did not act arbitrarily by using the formula to determine Mr. Curry's and Ms. Evelyn's proportionate share of the royalties from actual sales data. First, the Panel found that the Settling Parties represent all claims except those of Mr. Curry and Ms. Evelyn.

CARP Report, paras. 36 and 37. Second, based on this finding and application of the simple mathematical concept that the sum of the parts must equal the whole, the Panel accepted the presentation of evidence for the two individual claimants' share of the royalties and deducted this sum from 100% to determine the Settling Parties' share of the royalties. CARP Report, para. 69. Such an approach is logical and consistent and was fully within the discretion of the Panel.

Ms. Evelyn raises a second challenge to the methodology utilized by the Panel. Specifically, she challenges the fact that the Panel considered the total sales figures for 1992, rather than only those sales which occurred during the time period that the Audio Home Recording Act was in effect (October 28, 1992 to December 31, 1992). The Register determines that this challenge is not fatal to the Panel's action. First, Ms. Evelyn did not file a claim to DART royalties for 1992, and her distribution is not affected by the Panel's determination for 1992. Second, there is no evidence in the record that suggests that the Panel could have ascertained the universe of record sales, and the sales of Mr. Curry, for the period from October 28, 1992, through December 31, 1992. Nevertheless, the Panel determined Mr. Curry's percentage claim from the annual sales data under an apparent assumption that record sales occurred at the same rate throughout 1992. A careful review of the record reveals no evidence suggesting that the rate of record sales during the effective period of the Audio Home Recording Act was statistically different from the rate of sales throughout the remainder of the calendar year. Consequently, the Register finds the Panel's use of the annual sales figures not arbitrary,

although evidence of record sales from this period would have provided the ideal precision for application of the formula. *See, National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 379 n.10 (D.C. Cir. 1982) (Tribunal's findings acceptable "though of less than ideal clarity," so long as "the path which the agency follows can reasonably be discerned.").

3. *Application of Methodology to Record Evidence.* The Register finds that the Panel did act arbitrarily in determining Mr. Curry's[7] share of the 1992, 1993, and 1994 Publishers Subfunds. The Panel erred by determining that Mr. Curry, as writer, and Mr. Curry, as publisher, were to receive the same award.

In determining Mr. Curry's record sales for the Writers Subfunds, the Panel prorated his sales based on his percentage contribution as author to each musical work. For example, the Panel accorded Mr. Curry credit for one-half, 50%, of the total record sales for the musical work "Burnin" because he was the co-author of the work. CARP Report, para. 34. While this approach is appropriate in determining Mr. Curry's share of the Writers Subfunds, it is contrary to the evidence in determining his share of the Publishers Subfunds. There is no evidence in the record which demonstrates that Mr. Curry was entitled to anything less than a one hundred percent publishing interest from the sales of the musical works credited to him by the Panel for the Publishers Subfunds. The Register is, therefore, recommending that Mr. Curry's

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[7] In his capacity as sole representative of Tajai Music, Inc., Mr. Curry filed claims to the 1992, 1993, and 1994 Publishers Subfunds.

award for the 1992-1994 Publishers Subfunds be adjusted to reflect a one hundred percent publishing interest for Mr. Curry as sole representative of Tajai.

One final point raised by Mr. Curry and Ms. Evelyn concerns the use of SoundScan as the definitive source of record sales data. The Report, however, clearly indicates that the Panel did consider evidence submitted by Mr. Curry regarding sales through record companies, and that after due consideration, the Panel rejected the evidence because he failed to provide the universe of record sales for these companies during the relevant time. CARP Report, para. 40. The Panel's decision to reject the record sales data submitted by Mr. Curry and rely upon the SoundScan data was not arbitrary.

Similarly, Ms. Evelyn's contention that the Settling Parties failed to provide additional data concerning additional DART eligible songs is without merit. The Panel carefully analyzed her direct case and found no credible evidence of sales or performances in the U.S. during the relevant period, CARP Report, paras. 41-48; the Panel did credit her with sales of musical works introduced by the Settling Parties. CARP Report, para. 35. Furthermore, the Register notes that the evidence presented by the Settling Parties, and adopted by the Panel, for record sales of Ms. Evelyn and Mr. Curry credit them both with greater sales than the evidence they presented in their written direct cases, thereby increasing the size of their respective awards. CARP Report, para. 62 and 64.

As discussed earlier in this Order, the Librarian's scope of review is very narrow. The limited scope certainly does not extend to reconsideration of the relative

weight to be accorded particular evidence, and the Librarian cannot second guess a CARP's balance and consideration of the evidence, unless it runs counter to the evidence presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983).

Conclusion

For the above stated reasons, the Register recommends that the following should be the percentages for the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds:

1992

	Writers	Publishers
Curry	00.007096	00.014745
Evelyn	NA	NA
Settling Parties	99.992904	99.985255
Total	100.00	100.00

1993

	Writers	Publishers
Curry	00.001608	00.003802
Evelyn	00.000084	NA
Settling Parties	99.998308	99.996198
Total	100.00	100.00

1994

	Writers	Publishers
Curry	00.003398	00.007066
Evelyn	00.000082	NA
Settling Parties	99.99652	99.992934
Total	100.00	100.00

II. Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1992-1994 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order setting the distribution of the royalties in the 1992-1994 Musical Works Funds.

Wherefore, it is ordered that the royalties in the 1992-1994 Musical Works Funds shall be distributed according to the following percentages:

1992

	Writers	Publishers
Curry	00.007096	00.014745
Evelyn	NA	NA
Settling Parties	99.992904	99.985255
Total	100.00	100.00

1993

	Writers	Publishers
Curry	00.001608	00.003802
Evelyn	00.000084	NA
Settling Parties	99.998308	99.996198
Total	100.00	100.00

1994

	Writers	Publishers
Curry	00.003398	00.007066
Evelyn	00.000082	NA
Settling Parties	99.99652	99.992934
Total	100.00	100.00

As provided in 17 U.S.C. 802(g), the period for appealing this Order to the United States Court of Appeals for the District of Columbia is 30 days from the effective date of this Order.

Dated: February 3, 1997.
Marybeth Peters,
Register of Copyrights.
Approved by:
James H. Billington,
The Librarian of Congress.
[FR Doc. 97-3316 Filed 2-11-97; 8:45 am]
BILLING CODE 1410-33-P

APPENDIX I

COPYRIGHT ACT TECHNICAL CORRECTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1861

TO MAKE TECHNICAL CORRECTIONS IN THE
SATELLITE HOME VIEWER ACT OF 1994
AND OTHER PROVISIONS OF TITLE 17,
UNITED STATES CODE

NOVEMBER 9, 1995

Serial No. 32

Printed for the use of the
Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1996

* * *

ings of musical compositions? I think there's got to be a way to do this.

MR. COBLE. Well, I appreciate your response.

And Mr. Chairman, I thank you for having recognized me.

MR. MOORHEAD. The gentleman from Virginia.

MR. GOODLATTE. Thank you, Mr. Chairman. And, welcome, Ms. Peters.

MS. PETERS. Thank you.

MR. GOODLATTE. We're glad to have you with us. I understand, from your testimony, that the first Copyright Arbitration Royalty Panel or CARP – I think we need a new acronym there – I understand you'll be in panel next week. How will this legislation help the CARP panels in that specific hearing and in general?

MS. PETERS. I could try to answer that, but actually, on my left I have my resident expert. And, I'm going to ask Bill to answer that question.

MR. GOODLATTE. Certainly.

MR. ROBERTS. Good morning.

We have right now, of course, as you indicated, the start of a CARP proceeding to distribute royalties collected under the cable compulsory license for the years 1990, 1991, and 1992. The distribution will be about $500 million, and we have already selected the three arbitrators to serve on that panel.

A serious problem that we have is with the billing for the arbitrators. We do not currently have authority to

deduct the cost of the arbitrators from the royalty fees, so we have a complication with now the arbitrators are uncertain as to how and under what means they will be compensated. We know at what rate they have specified, how many dollars per hour they will charge, but they have to work out with the parties an arrangement for payment and the terms of that payment, and it's going to be an added burden on the parties as well as the arbitrators and a time-consuming effort distracting from the proceeding while they work out the means and method of payment.

The proposal and the bill would simply allow us – we already are allowed to deduct our cost, the cost of the Copyright Office from the royalty fee – the bill will allow us to in addition to our cost to deduct the cost of the arbitrators right off the top of the royalty pool and make payment directly to them under terms that we can come to agreement with the arbitrators. So it's a much more efficient system and it eliminates the problem of the parties having to work out an arrangement with the arbitrators once the proceeding is started.

Ms. Peters. Let me add one more thing. It would also clarify the issue with regard to what proceedings are subject to the CARPS, which was, I think, an oversight. It would also clear up certain precontroversy procedures such as the decision to distribute royalties not in controversy. It would also give us clear authority to dismiss late or insufficient claims, and it would also direct all proposals for public broadcasting rates to go to a CARP and not to the Librarian of Congress, who has no authority to deal with them.

MR. GOODLATTE. Thank you. What problems do you have in raising fees and why did you decide not to raise fees in 1995?

* * *

APPENDIX J

PUBLIC LAW 105-80 [H.R. 672]; November 13, 1997
TITLE 17 TECHNICAL AMENDMENTS

An Act to make technical amendments to certain provisions of title 17, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TECHNICAL CORRECTIONS TO THE SATELLITE HOME VIEWER ACT OF 1994.
17 USC 119.

The Satellite Home Viewer Act of 1994 (Public Law 103-369) is amended as follows:

(1) Section 2(3)(A) is amended to read as follows:

"(A) in clause (i) by striking '12 cents' and inserting '17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in sections 258.2 of title 37, Code of Federal Regulations'; and"

(2) Section 2(4) is amended to read as follows:

"(4) Subsection (c) is amended –

"(A) in paragraph (1) –

"(i) by striking 'until December 31, 1992,';

"(ii) by striking '(2), (3) or (4)' and inserting '(2) or (3)'; and

"(iii) by striking the second sentence;

(B) in paragraph (2) –

"(i) in subparagraph (A) by striking 'July 1, 1991' and inserting 'July 1, 1996'; and

"(ii) in subparagraph (D) by striking 'December 31, 1994' and inserting 'December 31, 1999, or in accordance with the terms of the agreement, whichever is later'; and

"(C) in paragraph (3) –

"(i) in subparagraph (A) by striking 'December 31, 1991' and inserting 'January 1, 1997';

"(ii) by amending subparagraph (B) to read as follows:

"(B) ESTABLISHMENT OF ROYALTY FEES. – In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the

demands. Such investments shall be in public debt securities with maturities suitable to the needs of the Copyright Office, as determined by the Register of Copyrights, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

"(3) The income on such investments shall be deposited in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office.".

SEC. 8. COPYRIGHT ARBITRATION ROYALTY PANELS.

(a) ESTABLISHMENT AND PURPOSE – Section 801 of title 17, United States Code, is amended –

(1) in subsection (b)(1) by striking "and 116" in the first sentence and inserting "116, and 119";

(2) in subsection (c) by inserting after "panel" at the end of the sentences the following:

", including –

"(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

"(2) accepting or rejecting royalty claims filed under sections 111, 119 and 1007 on the basis of timeliness or the failure to establish the basis for a claim"; and

(3) by amending subsection (d) to read as follows:

"(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS. – The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators presiding in distribution proceedings at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be hired pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered reasonable costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1)."

(b) PROCEEDINGS. – Section 802(h) of title 17, United States Code is amended by amending paragraph (1) to read as follows:

"(1) DEDUCTIONS OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES. – The Librarian of Congress and the Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs incurred by the Library of Congress and the Copyright Office under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection

shall remain available until expended. In rate-making proceedings, the reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by the parties to the proceedings as directed by the arbitration panels under subsection (c).".

* * *

APPENDIX K

BIOGRAPHY

Alicia Carolyn Evelyn, was born in New York City in 1927. After graduating from Brooklyn College in 1949, she held various jobs including Air Force Clerk, Postal Clerk, Social Investigator and finally, elementary school teacher with the New York City Board of Education, from 1966 until September, 1982, then she retired and moved to San Diego where she tutored in the school system. As a first grade teacher for fourteen years, Ms. Evelyn used song and dance to teach phonics and for enhancements of learning – encouraging children to write and enjoy.

Ms. Evelyn has been a writer of poetry since elementary school. Ms. Evelyn began writing music and songs in high school and had her first songs published in 1951. She joined BMI in 1955. She had many recordings released in that year.

Ms. Evelyn has had many hit songs recorded, they are:

1955	Peper Hot Baby	– # 14 in Billboard's Book of Top 40 now in reissue by Jaye P. Morgan and Giselle MacKenzie
1959	Six Nights a Week Flower of Love	– Recorded by The Crests now in reissue
1961/62	I'm Counting on You	– # 1 in Billboard's Book of Top 40. On the Australian charts

		for 22 weeks. Recorded by Johnny O'Keefe # 42 in England recorded by Petula Clark and Johnny Nash now in reissue
1968	I get the Sweetest Feeling (Written with Van McCoy)	– #34 Billboard's Pop Charts, #12 R & B Billboard Charts – # 9, # 25 and # 3 in 1972, 1975, 1989 UK Charts Recorded by The Platters and Jackie Wilson
Current Reissue	You Stay On My Mind	– Dinah Washington

With more than 200 published songs, Ms. Evelyn has had recordings by pop, country, R & B and foreign artists and has written songs with many prominent writers. After 17 years in BMI, she joined ASCAP. She is a current member of ASCAP. Her writer and performer associates also include Brook Benton, Buck Ram of the Platters, Clyde Otis, Henry Glover and others.

APPENDIX L

BIOGRAPHY

JAMES CANNINGS – Recording artist, composer, arranger, songwriter, producer . . . born in Guyana, and ex-bandleader of J.C. Intruders, is a virtual one-man band, and as such has created a niche for himself. He travels with his guitar and amplifier to hospitals, nursing homes, hospices, schools, colleges, libraries and international festivals to share his reggae/world beat renditions. He plays Reggae, Calypso, Latin, Funk, Blues, R&R, Pop and Jazz. Cannings says: I am a student of the universe. It's my mission to aid in the spiritual upliftment of mankind through positive, thought-provoking lyrics. Cannings can attest to "Miracles" through the healing POWER of music – having struck chords of responses in patients of institutions where he has performed.

Through a unique blend of comedy, dance, music and lecture routines, Cannings offers programs in Substance Abuse, Social Studies, and Multi-Cultural/Global Studies. His "hit single," Don't Drink and Drive, is a staple in Junior High Schools in New York; he has performed it for students via the NYC Department of Transportation's Safety and Health Education Program and it is a feature in the observance of National Alcohol Awareness Month.

An accomplished keyboardist and guitarist, Cannings' skills range from musician, composer, songwriter, arranger, producer to studio engineer. A degree from Baruch College in International Marketing allows management of all aspects of his career. Music is a business, he explains, I can take a song from the mind to the

market through all the necessary processes. Armed with this business savvy, Cannings founded J.C. Records, JGC Entertainment Co., Can Can Music Publishing, and co-founded Capricorn Audio and Video Cassette Duplication Company; he was also founder and owner of Cannings Recording Studio, Inc., the first and only black-owned 24-track studio in Manhattan during the time of its existence.

Recently, Cannings founded OOPS – Our Own Performance Society, Inc. – a not-for-profit corporation, which champions the performing rights needs and lobbies on behalf of songwriters and music publishers.

Cannings is proud of sharing his reggae/world vision with US Presidents: By Invitation of former President Carter, he was a guest at the White House in 1979 and his files boast responses from Presidents Reagan and Clinton acknowledging both their receipt of his music, and consideration of his opinions.

James Cannings has been releasing records since 1975. His first single on Empire Records in the U.S., released in the W.I., Africa and Canada by WIRL Records, was #32 on the top 40 charts of WHSB radio in the U.S. As Time Goes On, a 1988 U.S. A/C crossover record (listed in the Gavin Report Adult Contemporary Chart), was programmed by Tyrone Downie, keyboardist with Bob Marley & the Wailers. Downie played keyboards on this recording. In the West Indies, James was keyboardist with Jackie Opel, vocalist of the Troubadours of Barbados. James also was initially instrumental in the career development of ("Feeling Hot, Hot") Arrow. On this album, Arrow sang background vocals on "Dayo."

Cannings has preformed many times on U.S. national TV via the "Joe Franklin Show." The "James Cannings Special," aired on Manhattan Neighborhood Network, is hosted by James.

Cannings is quoted several times in the book "JACO The World's Greatest Bass Player." Jaco Pastorius, bassist with Joni Mitchell and "Weather Report", performed with and was a roommate of Cannings.

In Summer 1997, Cannings performed at PANAFEST in Ghana, West Africa. His performance rights groups, OOPS, has clinched a deal with the Copyright Society of Ghana (COSGA), giving COSGA the right to license songs represented by OOPS. Cannings traveled to Israel, in July 1998, where he was scheduled to make a guest appearance with Alpha Blondy & The Solar System.

Cannings has recorded three full-length albums, to-date: Music For All Seasons, Moments and All That Jazz and Blues. Here is another, "The Best of James Cannings" – chock-full of scintillating tracks which are sure to please the most discriminating ear. The final three songs – Wings of A Dove, Shame & Scandal and Hava Nagila (A Chasidic Folk Song) – were recorded with Rafael Allen who did the programming and also background vocals with Douglas Daniel (Mickey D).

Contact James Cannings at JGC Entertainment/JC Records, 400 2nd Ave., NY, NY 10010, Phone 212-642-8260. Fax: 212-725-2691. e-mail jcrec10@rcn.com.
– PATRICIA BOOTHE –

Supreme Court, U.S.
FILED
JUN 22 1999
CLERK

No. 98-1814

In The

Supreme Court of the United States

JAMES CANNINGS, et al.,

Petitioners,

v.

THE LIBRARIAN OF CONGRESS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.8 of the rules of this Court petitioners submit this supplemental brief to address the implications of the opinion of this Court in *Dickinson, Acting Commissioner of Patents and Trademarks v. Zurko et al.* No. 98-377. Argued March 24, 1999 – Decided June 10, 1999. This opinion demonstrates the importance of an issue placed before the Court by the pending petition for writ of certiorari.

In *Dickinson*, this Court held that the Federal Circuit *must* use the framework set forth in §706 when reviewing PTO findings of fact. Pp. 3-14. This Court further stresses that, absent an exception, a reviewing court *must* apply the APA's court/agency review standard to *agency* factual findings (emphasis added). The Court of Appeals for the District of Columbia Circuit bases such an exception on the fact that subsection 802(g) of the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304 contains no reference to the APA. *National Associations of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998) at 919. However, the 1993 Act of Congress *did not clearly and expressly* grant an exception to the reviewing court to apply another standard of review. Therefore, according to this Court's opinion in *Dickinson*, the APA's court/agency review standard *must* apply to the agency (Librarian's) factual findings (emphasis added). The reviewing court did *not* apply the APA's standard of review in *Eugene Curry v. the Librarian of Congress* No. 97-1119 and *James Cannings v. the Librarian of Congress* (below) No. 98-1250.

Review by this Court of the petition of *James Cannings et al.*, is necessary to prevent further fundamental errors of analysis by the judiciary. The fact that this Court in *Dickinson*, held that the APA standard of review *must* apply and that the Court of Appeals for the District of Columbia Circuit rejected that analysis, demonstrates the necessity for guidance by this Court as to the correct standard of review in *Curry* and *Cannings*. The opinion of this Court in *Dickinson*, provides additional reasons to grant the pending petition. Therefore, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

James Gideon Cannings
Pro Se

Alicia Carolyn Evelyn
Pro Se